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# Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine

By JUDITH L. MAUTE\*

## Introduction

The last ten years have wrought drastic changes upon the legal profession in America. Before then, federal intrusions on autonomous self-regulation by state bar associations were rare. With isolated exceptions regarding prospective clients' first amendment rights<sup>1</sup> and lawyers' political speech,<sup>2</sup> state bar authorities could regulate attorney conduct without fear of federal intervention even though the regulations had an anticompetitive effect.<sup>3</sup> The Supreme Court's decision in *Goldfarb v. Virginia State Bar*,<sup>4</sup> which held that minimum fee schedules for attorneys violate the Sherman Antitrust Act,<sup>5</sup> signalled the end of this unbridled, autonomous self-regulation. In subsequent decisions the Court has continued to undercut anticompetitive regulations of the profession, but it has used the new First Amendment commercial speech doctrine rather than antitrust law.<sup>6</sup> In so doing, the Supreme Court has indirectly fostered competition in the legal market, a market generally held immune

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1. See, e.g., *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

2. See, e.g., *Baird v. State Bar*, 401 U.S. 1 (1971); *In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866).

3. A. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 679 (2d ed. 1984).

4. 421 U.S. 773 (1975).

5. 15 U.S.C. §§ 1-7 (1982).

6. *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Bates v. State Bar*, 433 U.S. 350 (1977).

from direct antitrust attack because of the state action exemption to the antitrust laws.

This Article explores the significance of the Court's decision to scrutinize anticompetitive regulation of attorney advertising and solicitation under the commercial speech doctrine rather than under the antitrust laws. It asks, and starts to answer, several questions. Are the policies underlying antitrust and commercial speech wholly dissimilar? Is the Court's standard applied in antitrust actions all that different from its test for restrictions on commercial speech? What effect has each doctrine had on competition within the professions?

Although the two doctrines address a similar concern—competition—the commercial speech doctrine views competition in terms of a number of values, whereas antitrust analysis focuses only on economic values. In the short run, the use of the broader and newer doctrine of commercial speech means that the standards for regulating attorney advertising and solicitation are less certain and predictable. To the extent that the Supreme Court relies upon antitrust analysis as a starting point in applying the commercial speech doctrine, the parameters of the law may be developed smoothly enough. In the long term, the substantive difference resulting from this choice of doctrine is perhaps not the more significant result; rather, it is that enforcing regulation through the commercial speech doctrine results in significant procedural differences. For instance, application of antitrust law instead of commercial speech protection would affect the identity of enforcing parties, recoverability of attorneys fees, and the availability of treble damage awards.<sup>7</sup> The Article suggests that the legal profession's legitimate concerns for self-regulation and the public's interest in access to a full range of legal services may be served better by the constitutional doctrine than by antitrust law.<sup>8</sup>

Part I identifies key issues relevant to comparing the two doctrines and their probable impact on self-regulation. It compares the substantive law of antitrust and commercial speech, their underlying policies, levels of scrutiny and real or practical exemptions from scrutiny. It examines commercial speech doctrine as applied to lawyer advertising and solicitation, first with Supreme Court analysis of the issues, and then with current developments concerning television advertising and direct mail

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7. See *infra* notes 43-47 and accompanying text.

8. This assessment is based solely on the comparison between antitrust and commercial speech law, and their projected impact on the legal profession. The resulting impact on overall First Amendment doctrine is *not* a factor in that determination. Indeed, the author has serious reservations about the entire commercial speech doctrine and its impact on the level of protection given to core First Amendment speech—the public debate necessary to our society's collective struggle for self-determination in our system of government.

solicitations, and finally, it raises questions about the nonsolicitation rule adopted in the pending Rules of Professional Conduct. Part II explores the significance of the doctrinal choice to protect lawyers' competitive marketing activities through the commercial speech, and not the anti-trust doctrine. It finds that the primary differences lie, not in the outcome on particular marketing activities, but in the range of conduct subject to review, the parties involved in the challenge, and the relevant policies and procedures. The Article concludes by arguing that easing restrictions on legitimate marketing activities by lawyers will enhance consumer welfare by improving access to affordable and competent legal services.

### I. Doctrinal Choice: Antitrust or Commercial Speech?

Lawyers' ethical rules and the ethical rules and alleged anticompetitive conduct of many other professional<sup>9</sup> associations<sup>10</sup> are scrutinized under different doctrines. This anomaly is attributable to the institutional position of state bar associations. In most jurisdictions, state laws create, and bar associations and state supreme courts enforce, both licensing standards and ethical rules for lawyers.<sup>11</sup> By contrast, for most other professions, only licensing standards are statutory; their ethical rules are generally adopted and enforced by private associations.<sup>12</sup>

This quasi-governmental status of state bar associations has brought its activities within the "state action" exemption to antitrust laws. Under the landmark Supreme Court decision in *Parker v. Brown*,<sup>13</sup> restraints on competition are immune from antitrust attack to the extent they consti-

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9. A "professional" is one who uses "intellectual and technical skills and knowledge that have been obtained through a substantial investment in formal education and training." KISSAM, *Antitrust Law and Professional Behavior*, 62 TEX. L. REV. 1, 5 (1983).

10. At one time most trade associations of trained professionals regarded themselves as invulnerable to external regulation. This aura of immunity has begun to erode. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (minimum fee schedule established by state bar stricken under antitrust analysis); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950) (price-fixing activities of brokers subject to antitrust scrutiny); American Medical Ass'n v. United States, 317 U.S. 519 (1943) (physicians not immune from Sherman Act § 3 liability).

11. See, e.g., Note, *Arrow v. Dow: The Legacy of Lathrop—State Bars Under Attack*, 8 OKLA. CITY U.L. REV. 89, 89 n.2 (1983).

12. See, e.g., National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978); Benson v. Arizona State Bd. of Dental Examiners, 673 F.2d 272 (9th Cir. 1982) (state rental board enforcing licensing restrictions); Mardirosian v. American Inst. of Architects, 474 F. Supp. 628 (D.C. Cir. 1979) (private architect association); United States v. Association of Eng'g Geologists, 1985-1 Trade Cas. (CCH) ¶ 66,349 (C.D. Cal. 1984) (private association of geologists formulating ethical regulations).

13. 317 U.S. 341 (1943).

tute "state action or official action directed by a state."<sup>14</sup> Underlying this state action exemption was respect for state sovereignty, which only Congress could abridge.<sup>15</sup> The Court found that in passing the Sherman Antitrust Act, Congress did not intend to regulate the state when the state was acting in its sovereign capacity.<sup>16</sup> Rather, Congress intended to regulate only "persons,"— that is, businesses and individuals who operated as monopolies.<sup>17</sup>

In *Bates v. State Bar of Arizona*,<sup>18</sup> state-adopted legal ethics rules were held to reflect a clear articulation of state policy, thus falling within the *Parker v. Brown* exemption.<sup>19</sup> The ethical rules of other professions, however, to the extent they are not codified by the state, remain subject to antitrust scrutiny.<sup>20</sup> Lawyers' ethical rules concerning advertising and solicitation are immune from antitrust attack under the state action exemption. Nevertheless, precisely because they constitute state action these ethical rules are subject to the constitutional constraints of the commercial speech doctrine.

#### A. Antitrust Analysis

Consumer welfare and the efficient allocation of resources are two primary goals of antitrust law.<sup>21</sup> The post-Civil War era saw the rise of large scale business enterprises, or "trusts," which were seen as threats to consumers because of their dominant market positions and unfair business practices. The Sherman Antitrust Act and other antitrust laws were enacted to halt the spread of monopoly and to open markets to competition.

The theory of antitrust law assumes that maximum consumer welfare is achieved in a competitive marketplace, in which no participant or group of participants has enough market power to reduce output in order to charge higher than competitive prices.<sup>22</sup> This concern for maximizing consumer wealth excludes questions of how that prosperity is distributed

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14. *Id.* at 351.

15. *Id.*

16. *Id.* at 350-51.

17. *Id.* at 351.

18. 433 U.S. 350 (1977).

19. *Id.* at 356-57.

20. See, e.g., *Mardirosian v. American Inst. of Architects*, 474 F. Supp. 628 (D.C. Cir. 1979); *United States v. Association of Eng'g Geologists*, 1985-1 Trade Cas. (CCH) ¶ 66,349 (C.D. Cal. 1984) (consent decree).

21. L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 2 (1977); R. BORK, *THE ANTITRUST PARADOX* 8 (1978); H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 41 (1985).

22. L. SULLIVAN, *supra* note 21, at 2-5.

or used.<sup>23</sup> By excluding any ethical component, it "permits consumers to define by their expression of wants in the marketplace what things they regard as wealth."<sup>24</sup>

To achieve the goals of antitrust policy, courts apply either a per se illegality standard or a "rule of reason" test, depending on the nature of the challenged activity. The per se illegality standard applies to conduct which so clearly restrains competition that courts can find it illegal without engaging in complicated analysis.<sup>25</sup> Price-fixing activities are especially vulnerable; whether a professional association sets minimum<sup>26</sup> or maximum<sup>27</sup> fees, such naked restraints on trade fall under a per se illegality standard. Ethical rules that have lesser effects on competition are also suspect, but are tested under the rule of reason. Under this standard, the courts inquire more deeply into the economic realities of the affected market and measure the restraint's procompetitive effects against its anticompetitive effects.<sup>28</sup> Thus in applying the rule of reason, a court would consider whether the ethical norms—given the totality of the circumstances—restrict or promote competition and, if competition is restrained, whether that restriction has a legitimate justification given the available options.<sup>29</sup>

In antitrust litigation, the relevant issues are often highly technical and require significant economic data to establish the alleged anticompetitive effect. To satisfy jurisdictional requirements, plaintiffs must show that the challenged activity is "trade or commerce" within the statutory ambit.<sup>30</sup> A professional association is likely to claim exemption from the antitrust laws, either because it is a regulated industry,<sup>31</sup> or because its conduct is officially sanctioned by the state and thus shielded by the absolute immunity of the state action exemption.<sup>32</sup>

The state action exemption is, of course, most significant when considering whether to promote competition among lawyers via commercial speech doctrine. Both regulations and private activity are exempt from antitrust scrutiny if the state, acting in its sovereign capacity, adopts a "clearly articulated and affirmatively expressed" policy to displace com-

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23. R. BORK, *supra* note 21, at 90.

24. *Id.*

25. *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940).

26. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

27. *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982).

28. *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

29. *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679 (1978).

30. L. SULLIVAN, *supra* note 21, at 708.

31. *Id.* at 743-44; *see, e.g., Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

32. *Hoover v. Ronwin*, 104 S. Ct. 1989 (1984); *Goldfarb*, 421 U.S. 773 (1975).

petition.<sup>33</sup> In most jurisdictions, this policy is inferred from the state supreme court's delegation to the state bar association of extensive authority to determine initial licensing standards and ethical rules.<sup>34</sup> For example, in *Hoover v. Ronwin*,<sup>35</sup> the Arizona court rules authorized a bar committee to examine and recommend applicants for admission, reserving for the court only the ultimate authority to grant or deny admission. Because the court delegated authority and retained final power of supervision, allegedly anticompetitive bar passage decisions were held effectively insulated from antitrust scrutiny.<sup>36</sup> The direct holding of *Ronwin*, concerning licensing decisions, should have broad application to state-licensed professions with member-dominated bodies authorized to make admissions decisions. However, lawyers may be in a better position than other professionals to extend the force of law to their ethical standards and disciplinary actions.

Were the state action exemption not available to shield regulation of competition among lawyers, their conduct would be evaluated by either the rule of reason or the per se doctrine. Inhibitions on the competitive process are primarily judged by a rule of reason by balancing the procompetitive tendencies of the arrangement against any tendencies to injure competition.<sup>37</sup> An arrangement is an unreasonable restraint violating the Sherman Antitrust Act only when anticompetitive tendencies dominate.<sup>38</sup> In *Chicago Board of Trade v. United States*,<sup>39</sup> the Supreme Court gave perhaps the clearest exposition of the standards:

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.<sup>40</sup>

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33. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54 (1982).

34. Note, *supra* note 11, at 89 n.2.

35. 104 S. Ct. 1989 (1984).

36. *Id.* at 1997-98.

37. L. SULLIVAN, *supra* note 21, at 195-96.

38. *Id.* at 196.

39. 246 U.S. 231 (1918).

40. *Id.* at 238.

The per se doctrine applies when experience shows that given conduct blatantly restricts competition, thus dispensing with the need for the complex evidence and analysis required by the rule of reason.<sup>41</sup> For example, past experience has shown that price fixing is a naked restraint of competition that automatically fails under per se doctrine. Most claims of anticompetitive conduct by professional associations are evaluated under the more complex rule of reason.<sup>42</sup>

The varying complexity of review under rule of reason or per se analysis is not the only matter influencing the course of antitrust litigation. The identity of the parties seeking to enforce antitrust provisions also influences the character of the litigation. The Antitrust Division of the Justice Department can challenge anticompetitive conduct in civil<sup>43</sup> or criminal proceedings.<sup>44</sup> The Justice Department shares the enforcement power with the Federal Trade Commission (FTC) Bureau of Competition and with private parties claiming harm from the anticompetitive conduct.<sup>45</sup> Most professional activity is vulnerable to each of these enforcement mechanisms.<sup>46</sup> Because private enforcement often results in class action suits, treble damage awards and attorneys fees, bar associations should, perhaps, give an immense sigh of relief that the state action exemption precludes antitrust analysis of regulations for attorney advertising and solicitation.<sup>47</sup>

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41. L. SULLIVAN, *supra* note 21, at 196.

42. See, e.g., *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679 (1978); *Goldfarb*, 421 U.S. 773 (1975).

43. *Sherman Antitrust Act*, 15 U.S.C. §§ 4, 5 (1982) (Section 15 of Clayton Act); see L. SULLIVAN, *supra* note 21, at 751-59.

44. 15 U.S.C. §§ 1, 2 (1982); see L. SULLIVAN, *supra* note 21, at 751-59.

45. Section 11 of the Clayton Act, 15 U.S.C. § 21 (1982), provides for Commission enforcement of sections 2, 3, 7 and 8 of the Clayton Act. 15 U.S.C. §§ 15, 26 (1982) (sections 4 and 16 of the Clayton Act), grant private rights of action. See L. SULLIVAN, *supra* note 21, at 751 nn.6-7.

Currently the FTC shows the greatest active interest in lawyers' ethical rules restraining advertising, see, e.g., *FEDERAL TRADE COMMISSION, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES* (1984). The Antitrust Division of the Justice Department has also begun to examine the restraints. See Letter from J. Paul McGrath, Assistant Attorney General of Antitrust Division, to chief justices of state supreme courts (Sept. 21, 1984) (copy on file in the *Hastings Constitutional Law Quarterly* Office).

46. See, e.g., *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679 (1978) (civil action by Justice Department); *Goldfarb*, 421 U.S. 773 (1975) (private class action for damages and injunctive relief); *American Medical Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980) (per curiam), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) (civil action by FTC).

47. But cf. *Goldfarb*, 421 U.S. 773 (1975) (striking state bar fee schedule as antitrust violation).



## B. Commercial Speech Doctrine

Commercial speech is "speech of any form that advertises a product or service for profit or for business purpose."<sup>48</sup> In the professional context, its natural and immediate focus relates to conduct designed to obtain clients. Thus, this doctrine reaches anticompetitive restrictions on attorney advertising and solicitation. A wide range of commercial communications are constitutionally protected, including simple advertising of availability and prices for standardized legal services,<sup>49</sup> advertising intended to obtain clients for specific legal problems,<sup>50</sup> and benign, nonpecuniary solicitation.<sup>51</sup>

In contrast to antitrust law, which has had almost a century of development,<sup>52</sup> commercial speech doctrine was brought within First Amendment protection in 1976.<sup>53</sup> Consequently, its parameters are still in the formative stage, and will remain in a state of flux for some time while the Supreme Court reacts to each new situation. The current majority of the Supreme Court justices appear to be opting for a case-by-case approach instead of binding the Court to a predictably rigorous scrutiny of state regulation.<sup>54</sup> A practical result of choosing to use a new doctrine, commercial speech, is uncertainty and thus unpredictability. Given this uncertainty about future developments, the Supreme Court might use antitrust as an analytical starting point. This would have the advantage of increasing predictability since the Court would be able to rely on established antitrust policies and analysis of commercial speech. On the other hand, adoption of an antitrust analytical approach would reduce flexibility: commercial speech considers a wide range of issues including public debate, political association, and concepts of individual and collective autonomy, while antitrust is primarily concerned with competition in the marketplace. Should the Court completely abandon

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48. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 923 (2d ed. 1983) [hereinafter cited as J. NOWAK].

49. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

50. *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985).

51. *In re Primus*, 436 U.S. 412 (1978). See also *Central Hudson Gas & Elec. v. Public Service Comm'n*, 447 U.S. 557, 562 (1980) (commercial communication includes "speech proposing a commercial transaction"); J. NOWAK, *supra* note 48, at 923.

52. L. SULLIVAN, *supra* note 21, at 13.

53. *Virginia State Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976).

54. This reticence may be partly attributable to a fear of returning to the substantive economic due process of pre-1937, during which the Court set aside the economic judgments of legislative bodies because the enacted regulations violated the Court's view of proper economic regulations. J. NOWAK, *supra* note 48, at 942. See also Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

commercial speech in favor of an antitrust approach, it might lose the ability to take broader issues into account.

Although the constitutional commercial speech doctrine undoubtedly has a tremendous impact on the competitive market for delivery of legal services, the question remains: does it go far enough in protecting commercial communications that would be protected as permissible marketplace activities under antitrust laws? It may be that the doctrine does not reach the anticompetitive effects of rules against in-person solicitation done under noncoercive circumstances for the lawyer's pecuniary gain.<sup>55</sup>

*Bates v. State Bar of Arizona*,<sup>56</sup> which first applied the commercial speech doctrine to lawyer advertising, was also the first case to hold that the state action exemption insulated lawyers' ethical rules from antitrust scrutiny. Until then, Sherman Antitrust Act challenges were a very real possibility.<sup>57</sup> Indeed, the Court in *Bates* noted that allowing a "Sherman Act challenge to the disciplinary rule would have precisely [the] . . . undesired effect" of diminishing state authority to regulate its professions.<sup>58</sup> Since antitrust challenges have been brought against other professional associations that restrict advertising,<sup>59</sup> there is no reason to believe that restrictions on lawyer advertising would have escaped challenge were it not for the *Bates* holding.

Advertising is only the first level of business-promoting communication to receive commercial speech protection. Eventually the Court may have to confront what, if any, in-person solicitation of paying clients is constitutionally protected. Both forms of business-promoting conduct were banned under the 1908 Canons of Professional Ethics<sup>60</sup> and the disciplinary rules of the 1969 Code of Professional Responsibility.<sup>61</sup> Advertising is a group communication that informs the public-at-large of the lawyer's generalized willingness to perform services. Solicitation, on the other hand, involves a personal appeal directed to a prospective client. But at least theoretically, advertising and solicitation are parts of the same continuum. Moreover, the traditional distinction between the two has blurred with technological capabilities that enable large scale, per-

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55. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978) (Marshall, J., concurring).

56. 433 U.S. 350 (1977).

57. See Francis & Johnson, *The Emperor's Old Clothes: Piercing the Bar's Ethical Veil*, 13 WILLAMETTE L.J. 221, 247-71 (1977).

58. 433 U.S. at 360 n.11.

59. See, e.g., *American Medical Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980).

60. H. DRINKER, *LEGAL ETHICS* 316, 325 (1953) (citing Canons of Professional Ethics, Canons 27 & 46 (1951)).

61. See *In re R.M.J.*, 455 U.S. 191, 193 n.1 (1982) and *infra* note 106.

sonalized communications offering legal services to those who may need them.

Lawyer advertising and solicitation have been reviewed only under the commercial speech doctrine and not antitrust law. In traditional advertising cases, it may be that antitrust and commercial speech analysis yield a similar result—the sustaining of ethical rules prohibiting false or misleading advertising. In solicitation cases, however, antitrust analysis may have a different effect. Professional rules proscribing solicitation that are sustained under commercial speech analysis may be anticompetitive under antitrust principles. Thus, the substantive reach of antitrust and commercial speech law may not be fully coextensive.

### 1. *The Developing Supreme Court Protection of Commercial Speech*

Until a series of cases starting in 1973, the Supreme Court excluded commercial speech from the scope of constitutional protection.<sup>62</sup> The Court then did an about-face, rejecting the speech restrictive doctrine and protecting the speaker and consumers' rights to say and hear truthful messages about available products.<sup>63</sup>

*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>64</sup> invalidated a statutory ban on advertising prescription drug prices. The Court based its decision on the consuming public's First Amendment interest in the free flow of truthful information about lawful commercial activity.<sup>65</sup> The state's legitimate interest in maintaining professionalism of licensed pharmacists was insufficient to justify the advertising ban because the ban did not directly affect professional standards.<sup>66</sup> It appeared that the true purpose of the ban was to keep the state's consuming public ignorant of the overhead costs imposed by smaller, service-producing pharmacies. If consumers knew they could get the drugs from low-cost, low-service pharmacies, the "professional" pharmacist would be driven out of business, to the detriment of the pharmacy profession and arguably the public.<sup>67</sup>

This paternalistic restriction of the flow of information to consumers is inconsistent with a free market economy.<sup>68</sup> Moreover, just as commer-

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62. J. NOWAK, *supra* note 48, at 926-29.

63. See generally, J. NOWAK, *supra* note 48, at 925-43; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 651-56 (1978); Andrews, *Lawyer Advertising and the First Amendment*, 1981 AM. BAR FOUND. R.J. 967.

64. 425 U.S. 748 (1976).

65. *Id.* at 773.

66. *Id.* at 766, 770.

67. *Id.* at 770.

68. *Id.* at 765; J. NOWAK, *supra* note 48, at 932.

## cial information

is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.<sup>69</sup>

In short, the Court found that commercial speech is part of the robust public debate protected to enhance the public's autonomous choices about how the system should be regulated.

## 2. *Protection of Lawyers' Advertising as Commercial Speech*

For the legal and medical professions, some hope remained that the commercial speech doctrine would not extend to advertising by their members. *Virginia Pharmacy* appeared to leave open the possibility for bar associations to continue restricting attorney advertising without interference. The Court expressly limited its commercial speech protection to advertising by pharmacists. It reserved opinion as to advertising in other professions, which it indicated could require analysis of very different considerations. Lawyers "do not dispense standardized products; they render professional *services* of almost infinite variety" with increased possibility for confusion or deception from certain kinds of advertising.<sup>70</sup>

That possibility was short-lived; one year later, *Bates v. State Bar of Arizona*<sup>71</sup> held that the state could not constitutionally prohibit publication of truthful advertisements concerning the availability and price terms of routine legal services. In attempting to justify the ban, the state's primary argument concerned professionalism.<sup>72</sup> Price advertising would induce commercialization, thus undermining lawyers' dignity and self-worth; the "hustle of the marketplace" would negatively affect the profession's service orientation; and client trust would be diminished if the public perceived lawyers' profit motives.<sup>73</sup>

The Court rejected these arguments, finding "the postulated connection between advertising and the erosion of true professionalism to be

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69. *Virginia Bd. of Pharmacy*, 425 U.S. at 765 (footnotes omitted).

70. *Id.* at 773 n.25 (emphasis in original).

71. 433 U.S. 350, 384 (1977).

72. The state asserted six arguments to justify the ban, claiming lawyer advertising: would have an adverse effect on professionalism; is inherently misleading; would adversely affect the administration of justice; would have undesirable economic effects; would adversely affect the quality of service; and would present serious enforcement difficulties. *Id.* at 368-79.

73. *Id.* at 368.

severely strained.”<sup>74</sup> Instead, the advertising ban reflected the profession’s failure to meet community needs for legal services. Many persons who have a legal problem do not hire lawyers because they are afraid of high costs, or do not know how to obtain competent counsel.<sup>75</sup> Thus, commercial speech analysis rejected the professionalism justification based on the factual invalidity of the argument. In summarily concluding that the connection between advertising and reduced professionalism was not proved, the Court in *Bates* appeared to at least consider the potential legitimacy of the justification.

Although the holding in *Bates* is constitutionally based, Justice Blackmun’s majority opinion is replete with language analogous to antitrust analysis under the rule of reason. Under antitrust analysis also, the Court would have rejected the “redeeming virtue” justification, based, however, on its inherent illegitimacy rather than a factual invalidity. For example, the Court in *National Society of Professional Engineers v. United States*<sup>76</sup> addressed safety-based arguments in justification of the engineers’ policy of refusing to participate in bidding processes. Under the antitrust analysis applicable to the engineers’ association, such quality-protection justifications were impermissible regardless of their validity because this justification was based on an inherent rejection of the value of price competition.<sup>77</sup> Similarly, *Bates*’ rejection of the bar association’s claims of professionalism<sup>78</sup> was based on its belief in the inherent value of both information dissemination to consumers<sup>79</sup> and market competition.<sup>80</sup> Under antitrust analysis, then, the justification would have been illegitimate regardless of its factual validity, while under commercial speech analysis, the justification, though apparently given the benefit of fact-finding, was insufficient to justify the resulting restraint of information.

The analogue between antitrust analysis and commercial speech analysis is that both analyses may allow justifications for activity resulting in restrictions on price competition or information dissemination respectively, as long as such justifications are not an inherent rejection of

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74. At oral argument, counsel for Bates and Steen was more direct, noting that large law firms operate as big businesses. “[T]o term them noncommercial is sanctimonious humbug.” *Id.* at 368 n.19.

75. *Id.* at 370. The Court noted three barriers to effective delivery of legal services to lower and middle income consumers: (1) failing to recognize legal problems; (2) fear of high prices; (3) not knowing how to obtain a competent lawyer. *Id.* at 370-71 nn.22-23.

76. 435 U.S. 679 (1978)

77. *Id.* at 694-95.

78. *Bates*, 433 U.S. at 368-72.

79. *Id.* at 374.

80. *Id.* at 377.

the underlying values of the doctrine: the antitrust doctrine's value of price and quality competition and the First Amendment's value of the free flow of information.

An even more direct parallel to antitrust analysis may be seen in the Court's refusal to justify the advertising ban merely because price advertising provides incomplete information necessary for prudent lawyer selection. Paternalistic arguments based on the benefits of public ignorance underestimate the public's ability to recognize the limits of advertising.<sup>81</sup> Instead, access to legal services for the middle seventy per cent of the population could be enhanced by truthful disclosure of attorney fees since consumers could overcome the "difficulty of discovering the lowest cost seller of acceptable ability."<sup>82</sup> The alternative transaction costs of obtaining this information isolates lawyers from competition and reduces the incentive for competitive pricing.<sup>83</sup> Rather than increasing legal costs by raising overhead, the Court opined, advertising could actually reduce consumers' legal expenses.<sup>84</sup> Moreover, the advertising ban perpetuates the market position of established lawyers, thus presenting a significant entry barrier to the new competitor who has not yet had the opportunity to develop business-generating contacts.<sup>85</sup>

This implicit recognition of antitrust policy as part of First Amendment analysis was not uniformly accepted by the justices. In three separate opinions, Chief Justice Burger and Justices Powell, Stewart, and Rehnquist dissented to that part of the opinion protecting lawyers' right to advertise. Justice Powell (who was President of the American Bar Association at the time the offending rules were adopted in the Code of Professional Responsibility)<sup>86</sup> expressed the prevailing sentiment "that within undefined limits [the] decision will effect profound changes in the practice of law, viewed for centuries as a learned profession."<sup>87</sup> The resulting weakening of courts' supervisory authority over the bar is not required by the Constitution or the public interest.<sup>88</sup> Price advertising for "routine" services is deceptive because it disregards questions of quality and quantity of the service provided and makes facile assumptions

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81. *Id.* at 374-75.

82. *Id.* at 377.

83. *Id.*

84. *Id.* Indeed, empirical data now exists to support that hypothesis. See *infra* text accompanying notes 225-226.

85. 433 U.S. at 378.

86. Bowman, *The Proposed Model Rules of Professional Conduct: What Hath the ABA Wrought?*, 13 PAC. L.J. 273, 285-86 (1982).

87. 433 U.S. at 350.

88. *Id.*

that services can be classified as routine.<sup>89</sup> By contrast, Justice Powell found nothing inherently misleading in advertising consultation charges or hourly rates, provided that it was clear that the total charge to a client would depend on the actual time required.<sup>90</sup>

Justice Rehnquist agreed that the Sherman Antitrust Act claim was barred by the state action exemption, and he agreed with Powell's concern that lawyer advertising was inherently misleading. However, he expressed a fundamental disagreement with protecting commercial speech. Such protection would evaporate the distinctions between protected speech and unprotected advertising speech and the Court would predictably be relegated to ad hoc adjudications of advertisers' First Amendment claims.<sup>91</sup>

*Bates* was the watershed for lawyer advertising. States around the country heeded its invitation for help in defining the proper boundary between deceptive and nondeceptive advertising:<sup>92</sup> all states adopted new rules to permit *some* form of lawyer advertising.<sup>93</sup> Substantial controversy existed over whether the case should be read broadly—to protect all advertising that was not false or misleading—or narrowly—to protect only very limited and specific types of information contained in advertisements.<sup>94</sup> As a result, two alternatives evolved.<sup>95</sup> The regulatory approach opted for a narrow construction of *Bates*, limiting its First Amendment protection of lawyer advertising. Adopted by thirty-one states, and typified by the Model Code of Professional Responsibility (CPR) amended Disciplinary Rule (DR) 2-101, the rules specify the precise types of information permissible in advertising. Ironically, some post-*Bates* amendments are so restrictive that they would prohibit the very advertisement protected by the Court.<sup>96</sup> By contrast, the nineteen

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89. *Id.* at 392-95.

90. *Id.* at 399. With all respect for Justice Powell, advertising the specified hourly rate without estimating total charge would not overcome middle and lower income persons' price fears, and would continue to deprive clients-consumers of the opportunity to make informed economic choices about the services they wish to purchase; the lawyer still retains substantial power to determine how much time should be spent, and thus unilateral authority to determine the total fee charged.

91. *Id.* at 404-05 (Rehnquist, J., dissenting).

92. *Id.* at 384.

93. Andrews, *supra* note 63, at 969.

94. *Id.* at 986-88.

95. *Id.*; Note, *In re R.M.J.: Reassessing the Extension of First Amendment Protection to Attorney Advertising*, 32 CATH. U.L. REV. 729, 742-45 (1983).

96. *Id.* at 971. This includes IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101, which was the basis for discipline in *Committee on Prof. Ethics v. Humphrey*, 355 N.W.2d 565 (Iowa 1984), *vacated and remanded*, 105 S. Ct. 2693 (1985), *aff'd*, 377 N.W.2d 643 (Iowa 1985), *appeal filed*, 54 U.S.L.W. 3565 (Feb. 11, 1986) (No. 85-1343), *appeal dismissed*, 54

states adopting the directive approach read *Bates* broadly to protect truthful competition in the legal marketplace. These rules merely prohibit advertising that is false, fraudulent, misleading, or deceptive, and sometimes those which are self-laudatory or unfair.<sup>97</sup> Not surprisingly, the states choosing to adopt and enforce the restrictive rules have provided the cases for subsequent Supreme Court review.<sup>98</sup>

Beginning with solicitation cases,<sup>99</sup> the Court embarked on fact-specific, essentially ad hoc evaluation of state regulations under the commercial speech doctrine. While the decisions have continued to be fact-specific and narrowly drawn,<sup>100</sup> they have been framed within the general guidelines of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>101</sup> *Central Hudson* permits the state to ban speech that is misleading or deceptive. To prohibit other commercial speech, the state must have a substantial interest, and no less restrictive means available to protect that interest. If, however, the state merely requires an advertiser to provide the consumer with additional information, the regulation need only be reasonably related to a substantial state interest.<sup>102</sup> While this case-by-case adjudication allows the Court carefully to delineate permissible types of regulation, it does little to create a cogent system of evaluating all types of commercial speech. As feared by Jus-

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U.S.L.W. 3687 (April 21, 1986), discussed *infra* at text accompanying notes 174-197. See Andrews, *supra* note 63, at 971 n.12.

97. See Andrews, *supra* note 63, at 988.

98. See, e.g., Committee on Prof. Ethics v. Humphrey, (discussed *supra* note 96, and *infra* notes 174-197 and accompanying text); Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985) (discussed *infra* notes 111-133 and accompanying text); *In re R.M.J.*, 455 U.S. 191 (1982) (discussed *infra* notes 106-110 and accompanying text).

99. See *infra* notes 141-185 and accompanying text (discussing solicitation of cases).

100. See, e.g., *In re R.M.J.*, 455 U.S. 191, 201 n.12 (1982).

101. 447 U.S. 557 (1980). In *Central Hudson*, Justice Powell articulated a four-part test for permissible state regulation of commercial speech: (1) The government may ban misleading or deceptive speech or speech that is related to unlawful activity; (2) If the State seeks to regulate protected commercial speech, it must assert a substantial interest to be achieved by the restrictions; (3) The regulatory technique must be in proportion to that interest; and (4)

"The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."

*Id.* at 563-64.

Noncommercial speech protected by the First Amendment is not subject to content regulation. Citing *Bates*, the *Central Hudson* Court found that commercial speakers are well-situated to evaluate the accuracy of messages and the lawfulness of the underlying activity. Since commercial speech arises out of economic self-interest, it is particularly resilient to overbroad regulation. *Id.* at 564 n.6.

102. Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2274 (1985).



tices Rehnquist and Marshall,<sup>103</sup> this ad hoc approach is creating doctrinal confusion and multiple tiers of scrutiny for commercial and other forms of protected speech. This confusion will inevitably affect the degree of protection given to core First Amendment speech.

The two post-*Bates* attorney advertising cases, *In re R.M.J.*<sup>104</sup> and *Zauderer v. Office of Disciplinary Counsel*,<sup>105</sup> exemplify the Court's ad hoc approach. Both cases involved restrictive, regulatory, post-*Bates* amendments to the advertising rules. R.M.J. was a sole practitioner who had recently entered practice in St. Louis; his efforts to attract a client base gained the attention of bar authorities, who sought his disbarment. The Missouri Supreme Court privately reprimanded him for including in his advertisements information other than that explicitly permitted by the amended rule and for mailing professional announcements to unauthorized persons.<sup>106</sup> The advertisements stated the jurisdictions in which he was licensed to practice, including his admission to practice before the United States Supreme Court, and the listed practice areas deviated from the precise wording prescribed by the rule.

Justice Powell, who had dissented in *Bates*, wrote the opinion for the Court, unanimously reversing the state's reprimand. The state disciplinary committee had identified no substantial interests supporting its strict regulation of the language used to advertise fields of practice or the jurisdictions in which a lawyer is licensed to practice.<sup>107</sup> Although the attorney's statement that he was admitted to practice before the Supreme Court was uninformative, in bad taste, and possibly misleading, the lower court did not determine that such information was potentially misleading

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103. See, e.g., Justice Rehnquist's concerns voiced in dissents in *Bates*, 433 U.S. at 404-05, and *Central Hudson*, 447 U.S. at 584-607, and Justice Marshall's concurring opinion in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 474 n.5 (1978).

104. 455 U.S. 191 (1982).

105. 105 S. Ct. 2265 (1985).

106. This violated the MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(A) (2) (1979), which permits sending announcements only to "lawyers, clients, former clients, personal friends, and relatives." *In re R.M.J.*, 455 U.S. at 198. This is a provision the author fondly refers to as the "country club" exception to the nonsolicitation rule because it allows established lawyers to construe broadly "personal friends" while unduly hampering the ability of new entrants to make known their availability to persons who may need their services.

107. *In re R.M.J.*, 455 U.S. at 205-06. Note 15 quotes in full the *Central Hudson* test (see *supra* note 101). *Id.* at 203. Later the Court refers to the absence of record evidence that the prohibition of a general announcement mailing resulted from failed efforts to proceed along a "less restrictive path." *Id.* In *Zauderer*, the Court claims the least restrictive alternative test applies only to prohibitions of commercial speech, and not to restrictions that require more speech. 105 S. Ct. at 2282 n.14. At present, it is unclear whether that distinction applies to all forms of commercial speech, or whether it is specially created in response to regulatory concerns for professional advertising.

and thus could not form the basis for discipline.<sup>108</sup> Finally, the Court examined the state's rule limiting the class of persons to whom attorneys could mail professional announcements. Absent proof that the rule was the least restrictive solution available to enforcement authorities, *R.M.J.* could not be disciplined for its violation.<sup>109</sup>

*In re R.M.J.* indicates the Supreme Court's intention to communicate clearly to state regulatory authorities that it will carefully evaluate state regulations that restrict the flow of useful, truthful information to legal consumers. In deference to professionalism concerns (and collegial self-interest) the Court might have articulated hypothetical state interests to justify the prohibitions. It might have overlooked deficiencies in the record and findings below. Instead, the Court required the state to substantiate fully its legitimate interests in restricting the flow of information and to show how the regulations furthered those interests.

The unanimity of *In re R.M.J.* and the choice of Justice Powell as the Court's voice are significant. Only four short years before, the Court was sharply divided on the basic issue of lawyer advertising, with Justice Powell articulating the professionalism concerns of state and national bar organizations. Although the opinion was narrowly drafted to provide for case-by-case adjudication, the message was still clear: lawyer advertising is here to stay and efforts to deprive consumers of useful information will be closely scrutinized.<sup>110</sup>

The Court allowed three years for the states and lower courts to react to this message. Then, in the 1985 Term, it decided *Zauderer v. Office of Disciplinary Counsel*.<sup>111</sup> Although it struck absolute prohibitions on advertising, the Court for the first time sustained a bar's disciplining of a lawyer for violating its advertising rules.<sup>112</sup> The Court modified its message from *R.M.J.*: it would still closely scrutinize outright bans on forms of commercial speech, however, it would be more lenient in its treatment of rules requiring attorney advertisements to disclose additional information. The tenor of the message also changed: the Court did not hold the state to the same strict burden of proof as in *R.M.J.*, and overlooked deficiencies in the record and proceedings below

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108. 455 U.S. at 205-06.

109. *Id.* For example, requiring filing of all general mailings could address some enforcement concerns, and public fear of mail from lawyers could be avoided with a required disclosure on the envelope that "This is an Advertisement." *Id.* at 206 and n.20.

110. *But see* Note, 32 CATH. U.L. REV., *supra* note 95, at 754-58 which reads *In re R.M.J.* less optimistically, and as implying that "states have a per se substantial interest in regulating all forms of commercial speech by attorneys, requiring only that the regulations be narrowly drawn." *Id.* at 757.

111. 105 S. Ct. 2265 (1985).

112. *Id.* at 2284.

in order to sustain the limited discipline of public reprimand.<sup>113</sup>

*Zauderer* acknowledged that print advertising is a form of solicitation: a communication directed to obtaining specific types of claims or clients.<sup>114</sup> Distinctions between personal and written solicitation involve only a question of degree. The Court moved toward the center of the controversy over permissible methods of promoting legal business. Predictably, there was division among the Justices over the issue. Justice White wrote the opinion for what can best be described as a shifting majority. Only Justices Blackmun and Stevens joined in the full opinion. Justices Brennan and Marshall joined in those parts of the opinion invalidating the state prohibitions, while Justices O'Connor and Rehnquist, and Chief Justice Burger joined in those parts of the opinion sustaining the discipline for failure to disclose additional information.<sup>115</sup> The central divisions revolved around two interrelated questions: how much deference should the commercial speech doctrine grant the state as sovereign, and how much more deference is warranted when the state is regulating lawyers as a professional group with greater societal obligations.<sup>116</sup>

Zauderer had placed two newspaper advertisements that attracted the attention of the bar authorities. The first advised readers that Zauderer's firm would represent defendants in drunk driving cases and that "[f]ull legal fees [would be] refunded if [they were] convicted of drunk driving."<sup>117</sup> Two days after the ad's first appearance, the Ohio disciplinary office told Zauderer that the ad appeared to offer representation of a criminal matter on a contingent fee basis, which violated DR 2-106(C). Zauderer withdrew the ad, apologized, and agreed to decline employment offered as a result of the ad. The second advertisement included an accurate drawing of a Dalkon Shield, with text indicating the types of problems the device allegedly caused. It advised the reader not to "assume it is too late to take legal action," that the firm was handling some such cases on a contingent fee basis, and that "[i]f there is no recovery, no legal fees are owed."<sup>118</sup> Prior to publication he sought and was denied an advisory statement from the disciplinary office as to whether the ad was ethically objectionable.<sup>119</sup>

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113. *Id.* at 2282-84.

114. *Id.* at 2276-77.

115. Justice Powell did not participate in consideration or decision of the case.

116. *See, e.g.*, 105 S. Ct. at 2281-83, 2276-80.

117. *Id.* at 2271 (brackets in original).

118. *Id.* at 2271-72.

119. *Id.* at 2289 (Brennan, J., concurring).

The state bar subsequently initiated administrative proceedings, which found four disciplinary violations. The Supreme Court of Ohio affirmed and issued a public reprimand. First, Zauderer had accepted employment in Dalkon Shield cases after giving unsolicited legal advice. This violated DR 2-103(A), prohibiting solicitation. Second, the drawing violated the proscription against illustrations, contained in DR 2-101(A). Third, Zauderer failed to disclose that clients might be liable for litigation costs in a contingent fee matter. This violated DR 2-101(A), which prohibits false, misleading, or deceptive communications, and DR 2-101(B)(15), which requires that attorneys charging contingent fees disclose whether percentages are charged before or after costs. Finally, the drunk driving advertisement was found potentially deceptive because it did not mention that the client could be found guilty of a lesser offense and remain liable for fees.<sup>120</sup>

The majority opinion restated the *Central Hudson* test. It found that Ohio failed to meet its burden of showing that the ban on legal advice and illustrations directly advanced substantial state interests through the least restrictive means available.<sup>121</sup>

Zauderer could not be disciplined for soliciting business with printed advertisements "containing truthful and nondeceptive information and advice" regarding a specific legal problem of potential clients.<sup>122</sup> Unlike the ban of in-person solicitation for pecuniary gain sustained in *Ohralik v. Ohio State Bar Association*,<sup>123</sup> this form of solicitation presents little risk of overreaching or coercion. Ohio claimed that the ban was needed to prevent litigation because of serious regulatory problems in distinguishing between deceptive and nondeceptive legal advice. The Court, however, found Zauderer's statements "easily verifiable and completely accurate."<sup>124</sup> Assessing the potential for deception in legal advice and information is comparable in complexity to that regularly done by the FTC in evaluating other types of advertising.<sup>125</sup> Regulatory burdens do not justify suppression of truthful and nondeceptive advertising because recent commercial speech decisions are:

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120. *Id.* at 2273. The administrative trial panel accepted a change in theory after the matter was tried on the original theory, that the ad was deceptive because it violated the proscription against contingent fees in criminal matters. *Id.* at 2272, 2292-93 (Brennan, J., concurring in part and dissenting in part).

121. *Id.* at 2276, 2278-79.

122. *Id.* at 2276-77, 2280.

123. 436 U.S. 477 (1978). See *infra* notes 134-157 and accompanying text.

124. *Id.* at 2279.

125. *Id.*

[G]rounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful. . . . Prophylactic restraints that would be unacceptable as applied to commercial advertising generally are therefore equally unacceptable as applied to appellant's advertising.<sup>126</sup>

The state's ban on illustrations also failed the *Central Hudson* test. The Court interpreted the rule to require that lawyer advertising be dignified. It then found no substantial state interest in maintaining dignified lawyer communications, and undignified behavior too infrequent to warrant a prophylactic rule. Nor is identifying deceptive or manipulative uses of visual content so burdensome that the state can resort to the more restrictive alternative of a blanket ban on illustrations. The FTC has shown it is possible to identify and suppress visually deceptive advertising. Because this can be done on a case-by-case basis, Zauderer could not be disciplined for using an accurate, nondeceptive illustration despite Ohio's prophylactic rule.<sup>127</sup>

A new majority, comprised of Justices White, Blackmun, and Stevens, now joined by O'Connor, Burger, and Rehnquist, sustained the public reprimand on two bases. First, in the Dalkon Shield advertisement, Zauderer failed to inform prospective clients that they might be liable for litigation costs, an additional disclosure allegedly required by the rules. Second, Ohio's change in theory did not deny him procedural due process, even though it resulted in a finding that the drunk driving advertisement was deceptive.

The first basis may portend a change in the Court's attitude, at least toward compelled commercial speech and the degree of deference to which professional regulation is entitled. Because the informational value to consumers is the primary justification for protecting commercial speech, compelled disclosure of commercial information is less rigorously

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126. *Id.* at 2279-80. Justices O'Connor, Burger, and Rehnquist dissented from that portion of the opinion invalidating the prohibition on legal advice in advertisements. Absent such a rule, exigencies of the marketplace will encourage lawyers to present that advice in the manner most likely to attract clients. State regulation of professional advice in advertisements is entitled to greater deference than regulation of claims regarding commercial goods. Ohio could reasonably determine that use of unsolicited legal advice poses a sufficient threat to substantial state interests to justify a blanket prohibition. *Id.* at 2296.

127. *Id.* at 2295. Justices O'Connor, Burger, and Rehnquist concurred in the judgment that discipline could not be imposed for the illustration. The regulatory burden is not so great as to warrant a complete ban of illustrations in print advertisements, although they and the majority expressed no view as to potential regulatory burdens from broadcast media advertisements. *Id.* at 2294 n.1.

scrutinized than compulsion to disclose noncommercial information.<sup>128</sup> By contrast, compelled disclosure of additional information could have anticompetitive effects. First, increased advertising costs could chill some advertisements. Second, if compelled disclosure practically dictates that everyone provide the same information, such rules could chill legitimate differentiation over the legal services offered by the advertising practitioners.<sup>129</sup> The advertiser's rights are "adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."<sup>130</sup> Here, the ad was potentially deceptive because it left the impression that if there was no recovery, the client would owe nothing.<sup>131</sup>

In sustaining the public reprimand for Zauderer's failure to make disclosures, the majority may be signalling to states a new willingness to uphold certain advertising regulations without the exacting scrutiny of the *Central Hudson* test. Although the rule in *Zauderer* was not narrowly drawn and did not specify what information the attorney was required to disclose, the Court nevertheless upheld it.<sup>132</sup> This ad hoc decision suggests unprincipled lenience toward poorly drafted rules and sloppy regulatory efforts. As such, it defeats the concern for predictability in the drafting and interpretation of advertising and solicitation rules.

Notwithstanding this criticism, the lenient treatment of the state's rules compelling disclosure signifies the Court's reaffirmance of the principle that in commercial speech, more information is better than less. By characterizing the invalid illustration ban as part of a more general concern for manipulative uses of visual media, the Court begins to suggest a possible analysis for broadcast media regulations. Similarly, rejecting the hypothetical state interest that advertisements be "dignified" portends an

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128. *Id.* at 2281.

129. The author's informal survey of newspaper advertising suggests very little difference in the substance of what is communicated in much lawyer advertising.

130. *Zauderer*, 105 S. Ct. at 2282.

131. *Id.* at 2283. Justices Brennan and Marshall dissented to this portion of the Court's opinion, which they believe "greatly overstates the distinction between suppression and disclosure"; while the "least restrictive means" analysis is inapplicable to commercial speech disclosure requirements, the requirements "may extend no further than 'reasonably necessary' to serve" substantial state interests. *Id.* at 2285-86 nn.1-2. Although they agree the State could require some disclaimer concerning costs to avoid potential misunderstanding, the record does not establish that Zauderer's ad was specifically covered by DR 2-102(B)(15), which provides clear, advance notice of the precise disclosures required, nor does the record indicate the substantial state interest served by the various possible disclosures. The sanction violates basic due process and First Amendment guarantees. *Id.* at 2287-93.

132. Unfortunately, the Ohio court did not precisely identify the required disclosures, which made it difficult to evaluate Zauderer's claim that the disclosures would be burdensome and chill advertising of contingent fees. *Id.* at 2283 n.15.

attitude that consumers must be trusted to make their own rational discriminations about a lawyer's advertising. To some lawyers any advertising is undignified and professionally demeaning.<sup>133</sup> Their sensibilities cannot control the flow of truthful information to the consuming public.

Also important was the Court's reference to the FTC's ability to judge false or misleading advertisements. This suggests that the Court expects to hold state disciplinary agencies to the same level of regulatory expertise demonstrated by the FTC in regulating lawyer's commercial speech. Given that state disciplinary agencies have responsibility for policing the full range of lawyer misconduct, while the FTC has a more limited focus, an expectation of comparable expertise could greatly restrict bar authorities' policing of advertising.

Finally, *Zauderer* steadily proceeds toward the center of another issue of commercial speech—the advertising-solicitation controversy. In acknowledging that even print advertisements are a form of solicitation, it challenges facile assumptions that clear lines separate the two. This raises questions about the nonsolicitation principle.

### 3. *Solicitation as Commercial Speech*

Since the 1908 Canons, both advertising and solicitation were prohibited forms of securing new legal business. Solicitation, as direct communication with prospective clients, was regarded with greater distaste than advertising and thus was flatly prohibited. Thus far, Supreme Court commercial speech decisions have maintained the distinction between the two forms of lawyers' commercial speech, sustaining an outright ban on certain in-person solicitation, while carefully scrutinizing advertising rules. As *Zauderer* indicates, modern forms of communicating to large numbers of persons in a targeted population make this line increasingly difficult to draw.

Both advertising and solicitation could have procompetitive effects in the legal marketplace. Unrestricted lawyer communications would give service-providers access to consumers in need of specified legal services. Resulting matches between lawyers with specific skills and clients needing those skills could enhance consumer welfare by increasing access to the legal system. Nevertheless, such potential for procompetitive effect carries less weight under commercial speech doctrine than it would under antitrust law.

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133. See, e.g., statement of Chief Justice Burger to ABA Commission on Professionalism. "He would 'dig ditches' before resorting to advertising." "[M]y advice to the public is—never, never, never, under any circumstances, engage the services of a lawyer who advertises." Taylor, *Update: Lawyer Advertising*, 11 LITIGATION NEWS 3 (1985).

The Supreme Court examined solicitation in *Ohralik v. Ohio State Bar Association*<sup>134</sup> and *In re Primus*.<sup>135</sup> The opinions demonstrate on the one hand the potential range of activities which may be considered lawyer solicitation, and on the other, the concerns underlying antisolicitation rules. *Ohralik* exemplifies the concern for protecting consumers from fraud, overreaching and intimidation, which can force prospective clients into choosing a lawyer before they can make an informed decision. Antitrust and commercial speech law are parallel in this respect. Yet, commercial speech doctrine encompasses a broader range of concerns. *Ohralik* upheld restrictions which were partly justified to protect clients from conflicts of interest or underrepresentation, professional values that do not fit strictly in a market analysis focused on economic benefits from competition. In one respect, *In re Primus* involves rights of political association, yet at a deeper level it respects the capacity of the individual to choose a lawyer autonomously when not subjected to improper pressures. In an abstract sense, these two diverse cases reflect the fundamental values of autonomy and self-determination that underlie much First Amendment analysis.

Factually, the two cases are polar opposites. *Ohralik* involved a personal injury lawyer who visited two young automobile accident victims in the hospital and again just after their release. The lawyer persuaded the driver of one car to retain him; despite an apparent conflict of interest, he then visited the other victim, a passenger in the same car. He recorded the conversations without the victims' knowledge or permission. A lawyer of ordinary prudence should have questioned whether either woman was capable of making a reasoned, informed decision about retaining a lawyer at that time.<sup>136</sup> When they subsequently discharged him, he sued one and received a settlement from the other for breach of contract. The Ohio Supreme Court ordered the lawyer's indefinite suspension.

*In re Primus*<sup>137</sup> involved quite different circumstances, characterized by Justice Marshall as "'solicitation' . . . in accordance with the highest standards of the legal profession."<sup>138</sup> The case involved a private practitioner who was a volunteer worker for a local ACLU branch and a paid consultant for a local nonprofit group. In the latter capacity, she complied with a request to meet with a group of women to discuss their

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134. 436 U.S. 447 (1978).

135. 436 U.S. 412 (1978).

136. 436 U.S. at 469 (Marshall, J., concurring).

137. 436 U.S. 412 (1978).

138. 436 U.S. at 470 (Marshall, J., concurring).



legal rights. The women had been sterilized as a condition of their continued receipt of public medical assistance.<sup>139</sup> When the attorney heard that one woman wished to file suit, she wrote to advise the woman that the ACLU had offered to file suit, without charge, on her behalf. The South Carolina Supreme Court found that the conduct was improper solicitation and warranted public reprimand.

Writing for the Court in both *Ohralik* and *Primus*, Justice Powell's opinions signalled the Court's shift toward ad hoc consideration of whether the lawyer's speech was constitutionally protected.<sup>140</sup> Only Justice Marshall's concurring opinion tried to draw a principled distinction between the cases. He explicitly focused on the *Bates* concern with promoting consumer welfare with truthful information facilitating informed consumer decisionmaking.

The distinctly different facts called for distinctly different constitutional analyses. *Ohralik*'s in-person solicitation of remunerative employment was a business transaction with speech as an essential but subordinate component. It was therefore protected by the commercial speech doctrine, but entitled to less rigorous scrutiny than the print advertising in *Bates*. Because the solicitation was done in person, it created opportunities to pressure the prospective clients to respond immediately, without allowing time to reflect or to compare other available services.<sup>141</sup> *Ohralik* conceded the state's compelling interest in preventing the risks of fraud, undue influence, overreaching, and vexatious conduct from solicitation. Thus, the only question was whether the state could constitutionally apply its broad prophylactic rule absent a showing of actual harm.<sup>142</sup> Affirming the sanction imposed below, the Court found the solicitation ban justified. Given the danger of overreaching when a lawyer, skilled in the art of persuasion, "personally solicits an unsophisticated, injured, or distressed lay person" and the difficulties of proving what actually occurred during the face-to-face meeting, effective self-regulation justifies a prophylactic rule designed to prevent potential harm.<sup>143</sup> As Justice Powell noted, *Ohralik* holds that the state may constitutionally proscribe in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences.<sup>144</sup>

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139. 436 U.S. at 415.

140. In fact, *Ohralik* signalled the Court's shift from the clearer constitutional emphasis of *Bates*, decided earlier in the year, to the murkier ad hoc analysis of later commercial speech cases. See *supra* notes 99-105, 132 and accompanying text.

141. 436 U.S. at 458.

142. *Id.* at 463-65.

143. *Id.* at 466-67.

144. *Id.* at 464.

The Court's reasoning in *Ohralik* is analogous to the per se illegality standard of antitrust, which enables courts to declare conduct illegal when it is inherently anticompetitive. Because coercive solicitation, historically viewed with disapproval,<sup>145</sup> carries an inherent potential for abuse, the Court found it reasonable "to presume that in-person solicitation by lawyers . . . [is] injurious to the person solicited."<sup>146</sup> This presumption of injury amounts to a finding that coercive solicitation is so inherently detrimental as to be per se proscribable, notwithstanding the commercial speech doctrine.

While an outright ban of certain forms of in-person, *commercial* solicitation is permissible under the commercial speech doctrine, the solicitation in *Primus* involved political association, which deserves the generous protection reserved for core First Amendment rights.<sup>147</sup> Broad prophylactic rules are inappropriate; state regulations must be narrowly drafted to further a compelling state interest. The means of advancing that interest must be to avoid unnecessary abridgement of associational freedoms.<sup>148</sup> *Primus* could not be disciplined constitutionally unless her activity actually involved the type of misconduct towards which the lawful prohibition was directed.<sup>149</sup> Because the solicitation by letter was not misleading, overbearing, or deceptive, it was not within the state's legitimate regulatory interests and the discipline could not stand.<sup>150</sup>

The deference to political association demonstrated by *Primus* has an antitrust counterpart: the state action exemption. Political speech is exempt from commercial speech review,<sup>151</sup> that is, it receives the fullest First Amendment protection rather than the limited protections of commercial speech.<sup>152</sup> Because "[t]he principle of freedom of speech springs from the necessities of . . . self-government,"<sup>153</sup> many commentators would accord the highest First Amendment protection to political speech.<sup>154</sup> State action is exempt from antitrust review when the state

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145. *Id.* at 454.

146. *Id.* at 466 (footnote omitted).

147. *In re Primus*, 436 U.S. at 432-33.

148. *Id.* at 432-34.

149. *Id.* at 434-35.

150. *Id.* at 439.

151. *Cf.* Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 15 (1979) (defining commercial speech as speech without political significance).

152. *Ohralik*, 436 U.S. at 471 (Marshall, J., concurring).

153. A. MEIKLEJOHN, *POLITICAL FREEDOM* 27 (1960).

154. *See, e.g.,* BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 300 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971).

operates in its governmental capacity.<sup>155</sup> In short, both commercial speech and antitrust analysis defer to the necessary requirements of government: the need of people to acquire information critical to their participation in democratic government, and the need of the state for freedom from restrictions when it acts on behalf of that government.

Taken at the most simplistic level, *Ohralik* and *Primus* could be seen as describing the outer parameters of permissible solicitation: the state may constitutionally prohibit any solicitation motivated by a lawyer's pecuniary interests, but may not sanction any solicitation done to further political association unless the solicitation was actually misleading, overbearing, or deceptive.<sup>156</sup> This reading is reflected in Rule 7.3 of the Model Rules of Professional Conduct. Rule 7.3 prohibits soliciting employment from a prospective client "when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."<sup>157</sup> Two factors raised in *Primus* and in Justice Marshall's concurring opinion cast doubt on such a broad reading. These questions relate to the particular fee arrangement and the form of communication by which the solicitation took place.

The first factor involves the fee arrangement in *Primus*. ACLU policy during the pendency of *Primus* prohibited cooperating lawyers from receiving any award of counsel fees for services rendered in ACLU-sponsored litigation.<sup>158</sup> However, ACLU national policy subsequently changed to allow local chapters to experiment with fee-sharing arrangements. The Court expressed no opinion on the impact such a policy would have on its analysis of the constitutional principles involved.<sup>159</sup> Dicta suggested a possible difference between traditional fee arrangements, in which the client pays the lawyer, and court-awarded fees, which are available only in limited circumstances, at the court's discre-

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155. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

156. That portion of the *Primus* opinion also provided that "[s]tates may insist that lawyers not solicit on behalf of lay organizations that exert control over the actual conduct of any ensuing litigation." 436 U.S. at 440, 472.

157. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983) (hereinafter cited as MODEL RULES), Direct Contact with Prospective Clients, provides in full:

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in-person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

158. 436 U.S. at 430 n.24.

159. *Id.*

tion, and often in smaller amounts.<sup>160</sup> If this difference is significant, future decisions may grant some protection to law firms that non-coercively solicit clients for certain types of "public interest" litigation despite lawyers' potential pecuniary interest in court-awarded fees. This protection could have its greatest impact in class actions brought under a private attorney general theory: it might permit class certification which would otherwise be barred by counsel's allegedly unethical conduct in soliciting class members.<sup>161</sup>

The second factor limiting the broad application of prophylactic antisolicitation rules concerns the method of communication involved in *Primus*. Just as the fee arrangement removed the lawyer's financial incentive for overbearing conduct, so the form of communication lessened the opportunity for improper conduct and subjected it to effective review by regulatory authorities. The letter merely provided information material to making an informed decision in deciding whether to pursue litigation. In contrast to in-person solicitation, the letter allowed time to deliberate, was not a significant invasion of privacy, was not misleading, and did not afford significant opportunity for coercion or overreaching.<sup>162</sup> Because the communication was in writing, a permanent record remained for later regulatory review.<sup>163</sup> Reliable proof is available to establish precisely what was said so the words can be evaluated as to whether they are false, misleading or deceptive.<sup>164</sup> This opportunity for retroactive policing by bar authorities may justify treating solicitation by letter differently from in-person solicitation. Some federal and state courts have apparently found this factor significant enough to afford constitutional protection to targeted direct mail solicitation.<sup>165</sup> The argument may be persuasive to the Supreme Court when it faces this question.<sup>166</sup>

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160. *Id.* at 430-31.

161. Comment, *Class Certification: Relevance of Plaintiff's Finances and Fee Arrangements With Counsel*, 40 U. PITT. L. REV. 70, 88-92 (1978).

162. *In re Primus*, 436 U.S. at 434-36.

163. *Id.* at 435-36.

164. This is in direct contrast to the inherent enforcement difficulties presented by in-person solicitation. See *Ohralik*, 436 U.S. at 467-68.

165. See, e.g., *Adams v. Attorney Registration and Disciplinary Comm'n*, No. 84 C 3548, slip op. (N.D. Ill. Aug. 15, 1985); *Spencer v. Honorable Justices of Supreme Ct. of Pa.*, 579 F. Supp. 880 (E.D. Pa. 1984); *Grievance Comm. v. Trantolo*, 192 Conn. 27, 470 A.2d 235 (1984); *In re Von Wigen*, 63 N.Y.2d 163, 470 N.E.2d 838, cert. denied, 105 S. Ct. 2704 (1985). But see, *Leoni v. State Bar of California*, 39 Cal. 3d 609, 704 P.2d 183, 217 Cal. Rptr. 423 (1985), appeal dismissed, 54 U.S.L.W. 3560 (Feb. 24, 1986) (sustained public reprimand for targeted direct mailing which was misleading or deceptive).

166. See *infra* notes 200-210 and accompanying text.

#### 4. *Current and Future Developments*

The Supreme Court's current commitment to ad hoc determination of commercial speech restrictions is not the only reason for uncertainty in the area of regulation of attorney advertising and solicitation. After *Bates*, all states amended their rules, but there is virtually no uniformity among the amendments. Local norms and sensibilities are incorporated in the actual rules, and before adopting a marketing program a lawyer should carefully investigate the local regulatory climate.<sup>167</sup>

Nevertheless, it is possible to make some generalizations about the current state of lawyer commercial speech. State courts, however reluctantly, seem to have accepted the central teaching of *Bates* that the state cannot constitutionally ban the use of print media for disseminating truthful, nondeceptive commercial information about lawyers.<sup>168</sup> Enforcement activities are now directed towards print advertisements that are potentially deceptive or misleading.<sup>169</sup> However, the scope of permissible regulation of advertising content<sup>170</sup> and time, place or manner restrictions remain unclear.<sup>171</sup>

As this article was in press, the Supreme Court summarily dismissed two appeals from state court decisions sustaining advertising restrictions. Summary disposition of one case, *Leoni v. State Bar of California*,<sup>172</sup> is unsurprising, since the state court found the massive directed mailings were actually misleading. Dismissal of *Humphrey* cannot be so easily explained. A summary disposition for want of a substantial federal question is technically a decision on the merits with some precedential value.

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167. Ross, *The Barriers to Lawyer Advertising*, Nat'l L.J., Dec. 16, 1985, at 14, col. 1.

168. See, e.g., *State ex rel. Okla. Bar Ass'n v. Schaffer*, 648 P.2d 355 (Okla. 1982); *In re Marcus*, 107 Wis. 2d 560, 320 N.W.2d 806 (1982).

169. See, e.g., *In re Sekerez*, 458 N.E.2d 229 (Ind. 1984), *cert. denied*, 105 S. Ct. 182 (1984) (litany of misconduct included improper trade name, false advertisements, neglect and abandonment of client matters; disbarment warranted).

170. An issue now germinating in the lower courts concerns mandatory disclaimer of expertise or quality of services. See, e.g., *Mezrano v. Alabama State Bar*, 434 So. 2d 732 (Ala. 1983) (improperly used trade name and failed to disclaim quality or expertise; suspension); *In re Johnson*, 341 N.W.2d 282 (Minn. 1983) (admonition vacated because rule prohibiting advertisement of legitimate national certification is unconstitutionally overbroad). Because consideration of specialization is ongoing by state bar authorities, see MODEL RULE 7.4(c), the Supreme Court will likely defer to state judgment until there is sufficient experience with which to evaluate the impact of resulting rules on the flow of truthful information. *Daves v. State Bar of Texas*, 691 S.W.2d 784 (Tex. Civ. App. 1985) (held the required disclaimer of specialization valid, but the six month suspension was an abuse of discretion).

171. See, e.g., *Mezrano v. Alabama State Bar*, 434 So. 2d 732 (Ala. 1983) (rule requires copies of all advertisements to be sent to the state bar within three days of first publication).

172. 39 Cal. 3d 609, 704 P.2d 183, 217 Cal. Rptr. 423 (1985), *appeal filed*, 54 U.S.L.W. 3463 (Dec. 23, 1985), *dismissed*, 54 U.S.L.W. 3560 (Feb. 24, 1986).

However, as elsewhere, the message is ambiguous.<sup>173</sup> *Zauderer*, where discipline was sustained with some leniency by the Court, and now these two prompt, summary dismissals might be seen as a retrenchment from expanding commercial speech protection. In any event, the Court clearly has not yet developed a consensus on the proper balance in this sensitive area. Quite possibly it has suspended development of the doctrine to await input from the states. Some predict *Humphrey* will have little impact because television advertising is a "closed chapter" in most states; only a few states have rules as restrictive as Iowa's and others are unlikely to amend their rules to tighten up on television advertising.<sup>174</sup> On the other hand, since most states are now actively evaluating proposed changes to the ethical rules, they might well interpret these cases as a basis for more restrictive rules. In all probability, these summary dismissals are not the last word on directed mailings and television advertising.

#### a. Television Advertising

Prevailing Supreme Court commercial speech rulings render suspect any outright ban on the use of normal communication channels except in-person communications under specific coercive circumstances. Television is so pervasive a mode of communication that no message can be expected to reach large numbers of the American public without it. Consequently, a blanket restriction on television advertising would probably not be the type of narrow regulation permitted by *Central Hudson*.<sup>175</sup> Nevertheless, in *Committee on Professional Ethics v. Humphrey*,<sup>176</sup> the Iowa Supreme Court upheld stringent restrictions on television advertising.

*Humphrey* addresses the extent to which the state may constitutionally regulate electronic media advertising by dictating allowable content and prohibiting variations on the manner of presentation. Iowa Code of Professional Responsibility DR 2-101(B) adopts the regulatory approach and lists twenty specific items that can be communicated in advertise-

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173. C. WRIGHT, *THE LAW OF FEDERAL COURTS* 757-58 (1983); Note, *The Precedential Effect of Summary Affirmances and Dismissals for Want of a Substantial Federal Question*, 64 VA. L. REV. 117 (1978); Note, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda*, 76 COL. L. REV. 508 (1976).

174. *Nat'l L.J.*, May 5, 1986, at 27.

175. See *Grievance Comm. v. Trantolo*, 192 Conn. 15, 470 A.2d 228 (1984) (interpreted post-*Bates* amendment's silence on television advertising not to impose blanket restriction). See also J. NOWAK, *supra* note 48, at 933-34.

176. 355 N.W.2d 565 (Iowa 1984), *vacated and remanded*, 105 S. Ct. 2693 (1985), *aff'd*, 377 N.W.2d 643 (Iowa 1985), *appeal filed*, 54 U.S.L.W. 3565 (Feb. 11, 1986) (No. 85-1343), *appeal dismissed*, 54 U.S.L.W. 3687 (April 21, 1986).

ments. It then requires that the information conveyed via television be "articulated by a single nondramatic voice, not that of the lawyer, and with no other background sound . . . [and] no visual display shall be allowed except that allowed in print as articulated by the announcer."<sup>177</sup>

177. IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (A) & (B) provide:

(A) A lawyer shall not, on the lawyer's own behalf, or that of a partner, associate or any other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication which contains any false, fraudulent, misleading, deceptive, self-laudatory or unfair statement, which contains any statement or claim relating to the quality of the lawyer's legal services, which appeals to the emotions, prejudices, or likes or dislikes of a person, or which contains any claim that is not verifiable; nor shall the lawyer use or participate in the use of any form of public communication, calculated to attract clients for the lawyer's pecuniary gain, which contains any information not hereafter specifically permitted. In all communications under DR 2-101 and DR 2-102 the lawyer may use restrained subjective characterizations of rates or fees such as "reasonable," "moderate," and "very reasonable," but shall avoid all unrestrained subjective characterizations of rates or fees, such as, but not limited to, "cut-rate," "lowest," "give-away," "below-cost," and "special." The lawyer shall further avoid the use of all signs and symbols such as, but not limited to, logos, trademarks, graphics, design work, and pictures.

(B) The following information, in words and numbers only, may be communicated to the public in newspapers, periodicals, trade journals, "shoppers" and other similar advertising media, published and disseminated in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides or in the classified advertising section of the telephone directory distributed in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides or in reputable legal directories generally available in such area. The same information may be communicated by direct mail. The same information, in words and numbers only, articulated only by a single nondramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio. The same information, in words and numbers only, articulated by a single nondramatic voice, not that of the lawyer, and with no other background sound, may be communicated on television. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications on radio and television, to the extent possible, shall be made only in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides. Any such information shall be presented in a dignified manner.

(1) Name, including name of law firm and names of professional associates, addresses and telephone numbers and the designation "lawyer," "attorney," "law firm" or the like;

(2) Fields of practice, limitation of practice or specialization, but only to the extent permitted by DR 2-105;

(3) Date and place of birth;

(4) Date and place of admission to the bar of state and federal courts;

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Legal authorships;

(9) Legal teaching positions;

(10) Memberships, offices and committee assignments in bar associations;

(11) Membership and offices in legal fraternities and legal societies;

(12) Technical and professional licenses;

(13) Memberships in scientific, technical and professional associations and societies;

(14) Foreign language ability;

The Humphrey law firm purchased several commercially produced advertisements in which actors portrayed nonlawyers discussing harm "caused by the negligence of another" and stressing the importance of careful lawyer selection. The dramatization was followed by a voice that identified the firm and indicated that the firm handled certain negligence matters on a percentage basis. The commercials did not indicate potential client liability for costs. After three days of broadcasts, the state ethics committee brought action to enjoin their continued use.<sup>178</sup>

The Iowa Supreme Court rejected constitutional challenges to the rule and issued a permanent injunction. Several prior United States Supreme Court decisions, including *Bates*, had recognized the "special problems" presented by electronic media, and its uniquely pervasive presence.<sup>179</sup> The court reasoned that because of the potential for deception, the state has greater latitude in regulating television advertising. *Bates* only "condemned restrictions on the flow of 'relevant information needed to reach an informed decision,' " but did not forbid prohibition of irrelevant information.<sup>180</sup> The disciplinary rule directly fostered a substantial state interest by aiding citizens to make rational and intelligent selection of counsel.<sup>181</sup> The court summarily dismissed Humphrey's claim that the prohibition against background sound, visual displays, and dramatic and self-laudatory statements were more extensive than necessary to serve substantial interests. "All that is prohibited are the tools which would manipulate the viewer's mind and will."<sup>182</sup>

Two justices vigorously dissented. They argued that the legal profession must accept reality: lawyer advertising is here to stay, and it has constitutional dimensions. The majority incorrectly improvised on the fourth prong of *Central Hudson* by upholding a prohibition on the mere

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(15) Names and addresses of bank references;

(16) With their written consent, names of clients regularly represented;

(17) Subject to DR 2-103, prepaid or group legal services programs in which the lawyer participates;

(18) Whether credit cards or other credit arrangements are accepted;

(19) Office and telephone answering service hours;

(20) Race, sex, religion or ethnic background. Nothing contained herein shall prohibit a lawyer from permitting the inclusion in reputable law lists and law directories intended primarily for the use of the legal profession of such information as traditionally has been included in these publications.

Additional restrictions are contained in subsections (C) through (I).

178. The FTC, National Ass'n of Broadcasters and Iowa Broadcaster's Ass'n appeared as amicus curiae. 355 N.W.2d at 565-66.

179. *Id.* at 569.

180. *Id.* at 570 (quoting *Bates*, 433 U.S. 350).

181. *Id.* at 571.

182. *Id.*



chance of deceit.<sup>183</sup> The content restriction improperly prohibits the flow of basic information necessary for informed judgment about lawyer selection, while restrictions on technique amount to a prescription for dullness, since they prohibit accepted methods of stimulating viewer interest.<sup>184</sup> The ethics committee's own expert testified that these ads were not misleading and that there was no history or experience showing that this particular form of advertising was subject to abuse.<sup>185</sup> The state's interest in facilitating informed lawyer selection was used in *Bates* to *expand* the scope of lawyer advertising, "not to throttle it."<sup>186</sup> Finally, they argued, except for the proscription of false or misleading advertising, the Iowa rule was unconstitutional.<sup>187</sup>

On appeal, the United States Supreme Court vacated and remanded for further consideration in light of *Zauderer*.<sup>188</sup> On remand, the Iowa Supreme Court reaffirmed, finding nothing in *Zauderer* at variance with its decision.<sup>189</sup> The Court's earlier belief that *Bates* reserved the unique problems of electronic broadcasts was borne out in the *Zauderer* majority's careful references to "printed advertising" and the dissent's reiteration that the broadcast media issues are reserved for later.<sup>190</sup> Based on the record below, electronic advertising remains closer to in-person solicitation which can be proscribed than to printed advertising.<sup>191</sup> The challenged rule is not an outright ban, such as the illustration ban in *Zauderer*, but merely a regulation of an advertising form that is ripe for abuse.<sup>192</sup> The Supreme Court dismissed Humphrey's next appeal only

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183. *Id.*

184. *Id.*

185. *Id.* at 573 (citing *Friedman v. Rogers*, 440 U.S. 1 (1979)) (history of deception with use of trade names in Texas); see *In re R.M.J.*, 455 U.S. 191, 202 (1982).

186. 355 N.W.2d at 575.

187. *Id.* at 576.

188. 105 S. Ct. 2693 (1985) (decided June 10). Justices Rehnquist and O'Connor would have noted probable jurisdiction and set the case for argument.

189. 377 N.W.2d 643 (Iowa 1985) (decided Nov. 13). The positions of the dissenting justices were either solidified or adjusted in response to *Zauderer*. In a special concurrence, three, including the chief justice, expressed their "deep philosophical concern" for the future of state courts if *Zauderer* is extended to the "inevitable machinations" of television advertising without the safeguards provided by the disciplinary rule. *Id.* at 647-48 (Reynoldson, C.J., concurring specially). The two prior dissenters maintained that the quoted language from *Bates* was not intended as a license to apply substantially different rules to television advertising. *Id.* at 654 (Carson, J., dissenting). Now Justice Uhlenhopp joined in the dissent, reluctantly concluding that because the Supreme Court "takes quite a broad view of constitutionally protected lawyer advertising," the challenged rules should be invalidated. *Id.* at 654 (Uhlenhopp, J., dissenting). An appeal petition was filed with the Supreme Court. 54 U.S.L.W. 3565.

190. 105 S. Ct. 2265, 2277, 2294 n.1 (1985).

191. *Id.* at 2277.

192. 355 N.W.2d at 569.

two months after it was filed.

Undoubtedly there are significant differences between broadcast and print media. Visual displays and dramatizations leave more to the recipient's interpretation than do printed words and symbols. Nevertheless, the FTC has previously demonstrated the capacity to evaluate which television ads are false or misleading, and which are not.<sup>193</sup> Iowa's prohibition against specified ways to communicate the commercial message virtually destroys the potential effectiveness of a televised advertising effort. Because there can be neither visual display, nor use of the lawyer's voice, the viewing public is deprived of valuable information for selecting a lawyer: the nuances of self-expression which the printed word cannot convey. The public cannot learn of the lawyer's voice or manner of dress. Viewers cannot determine whether the lawyer's message is traditionally delivered, in a law office filled with books or fancy office equipment, or whether, for example, it is humorously delivered to the tune of a badly played banjo.<sup>194</sup>

Prohibiting the lawyer's participation and any dramatization apparently limits commercials to a simple announcement, with any print overlaying a plain background. As argued by the *Humphrey* dissent, this merely assures dullness. The lawyer's advertising dollar is not put to effective use, it is simply wasted; after once tolerating sixty seconds of boredom, the American viewing public will leave the room for refreshments or other activities. Certainly that is not the type of time, place or manner restriction envisioned by the Supreme Court in reserving for later consideration the "special problems" of electronic broadcast advertising. Although there may be greater opportunity for deception with visual displays and dramatizations, an outright ban on their use is not a narrowly drawn regulation which directly advances the state's substantial interest in fostering intelligent lawyer selection. Thus, the commercial speech doctrine should properly uphold stricter regulation of broadcast advertising if narrowly designed to promote the important state interest of providing the public with truthful information, but not its blanket prohibition.

A similar outcome could be expected using the rule of reason test of antitrust law. The Iowa restriction might have some procompetitive effect. Visual images can make misleading suggestions that could escape

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193. *See id.* at 571.

194. Ken Hur, who previously practiced law in Wisconsin and now is a consultant for lawyer advertising, has produced a series of humorous commercials, including one with him badly playing the banjo and assuring clients that he was better at law. In another, Hur emerges from a lake with bejeweled arms to the tune of "Dance of the Sugar Plum Fairy." (Tapes on file with author.)

regulatory scrutiny, even though the same message, if written, might never survive agency review.<sup>195</sup> By restricting the use of visual images, the Iowa regulations protect consumers from misleading advertisements. The effects that promote competition, however, are outweighed by those which impede competition. Like any restriction of advertising, the Iowa regulations decrease the flow of free information in the market place.<sup>196</sup> Because visual images are effective aids to expression,<sup>197</sup> the prohibition of their use prevents attorneys from fully communicating to consumers information necessary to informed attorney selection. The restrictive nature of the Iowa regulations makes it difficult for attorneys to rely on important advertising tools, such as comparative advertising. Truthful comparative advertising, in which advertisers compare their own products, services or prices to those of their competitors, is viewed by the FTC as promoting public awareness of product information and therefore rational purchase decisions.<sup>198</sup> In turn, the increased buyer sophistication that results from advertising can serve to reduce prices.<sup>199</sup> Given the preponderance of the restrictions' anticompetitive effects over their procompetitive effects, they would be even more vulnerable to antitrust attack than to commercial speech scrutiny.

#### b. Direct Mail Solicitation

Direct mail solicitation is typically regulated by states' post-*Bates* amendments. Most current or pending ethical rules would permit lawyers to send letters to the general population, but not to persons who may have an immediate need for specific legal services.<sup>200</sup> Comments to the Model Rules contend that there is no less restrictive means of policing misleading or overbearing representations than an outright ban of direct mail solicitation; no other efforts would be practically effective.<sup>201</sup>

This view is not unanimously accepted. The Antitrust Division of the Justice Department and the Federal Trade Commission have argued

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195. Richards & Zakia, *Pictures: An Advertiser's Expressway Through FTC Regulation*, 16 GA. L. REV. 77, 78-80 (1981).

196. See Pridgen & Preston, *Enhancing the Flow of Information in the Marketplace: From Caveat Emptor to Virginia Pharmacy at the Federal Trade Commission*, 14 GA. L. REV. 635, 670-71 (1980).

197. Richards & Zakia, *supra* note 193, at 77-80.

198. Lee, *Comparative Advertising, Commercial Disparagement and False Advertising*, 71 THE TRADE-MARK REP. 620, 621 (1981); see also 8 ADVERTISING L. ANTHOLOGY 681.

199. See Khactu, *Advertising, Market Power and the Public Interest: The Lawyer's Case*, 55 N.D.L. REV. 525, 548-50 (1979); G. ROSDEN & P. ROSDEN, 3 THE LAW OF ADVERTISING 46-10 to 46-11 (1985).

200. MODEL RULES, Rule 7.3 (1983). See also The Florida Bar, 438 So. 2d 371 (Fla. 1983).

201. MODEL RULES, Rule 7.3 (1983) (comment).

for changes that would allow direct mail solicitation that is sent to targeted audiences.<sup>202</sup> Moreover, at least two federal courts and several state courts have afforded constitutional protection to such mailings.<sup>203</sup>

Direct mail solicitation to persons known to need a type of service offered by the lawyer is a cost effective way to advertise. Because the commercial message is given only to persons who realistically might become clients, no transaction costs are wasted by communicating with uninterested persons. Technology enables businesses to obtain information identifying the target group and then facilitates the preparation of personalized letters sent to individuals in the group. Lawyers' efforts to obtain new clients in their practice areas could be a cost effective way to match prospective clients with lawyers who are skilled in the particular field.

Opposition to direct mail solicitation tends to be both emotional and practical. Persons charged with drunk driving may be highly offended to learn their arrest has been discovered by others, even by lawyers offering to help. Families of mass disaster victims, the lay public, and many in the legal profession are often repulsed when lawyers swarm around the injured like buzzards. This invasion of privacy and offense to sensibilities is somewhat lessened when the offer of assistance comes by mail, rather than in person or by telegram. Further, a business entity might welcome hearing of a new, aggressive firm offering precisely the type of services it

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202. Letter from J. Paul McGrath, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, to State Supreme Court Justices 4-6 [hereinafter cited as McGrath letter] (Sept. 21, 1984); Staff Report to the Federal Trade Commission, *Improving Consumer Access to Legal Services: The Case for Removing Restrictions On Truthful Advertising* 159-63 [hereinafter cited as FTC Staff Report].

203. See, e.g., *Adams v. Attorney Registration and Disciplinary Comm'n*, No. 84 C 3548, slip op. (N.D. Ill. Aug. 15, 1985) (preliminary injunction granted); *Spencer v. Honorable Justices of Supreme Court of Pa.*, 579 F. Supp. 880 (E.D. Pa. 1984) (declaratory judgment); *Leoni v. State Bar of Cal.*, 152 Cal. App. 3d 302, 702 P.2d 583, 217 Cal. Rptr. 425 (1985), *appeal dismissed*, 54 U.S.L.W. 3560 (Feb. 24, 1986) (sustained discipline for misleading representations); *Grievance Comm. v. Trantolo*, 192 Conn. 27, 470 A.2d 235 (1984) (blanket prohibitions to third party, non-clients invalid); *In re Teichner*, 75 Ill. 2d 88, 387 N.E.2d 265 (1979) (in-person solicitation for pecuniary gain constitutionally protected because leaders of community disaster relief effort invited lawyer's assistance; associational rights involved); *In re Appert*, 315 N.W.2d 204 (Minn. 1981) (held unconstitutional bans on statements not false, fraudulent, deceptive or misleading); *In re Von Wiegen*, 63 N.Y.2d 163, 470 N.E.2d 838 (1984), *cert. denied*, 105 S. Ct. 2701 (1985) (blanket prohibition invalid, but sanctions for deceptive statements sustained). But see *The Florida Bar*, 438 So. 2d 371, 374 (Fla. 1983) (adopting amendment to the Florida Bar Code of Professional Responsibility DR 2-104 which, *inter alia*, prohibits a communication "prompted by a specific occurrence affecting the person to whom the communication is directed, or a member of his family, in a manner distinct from the effect on the general public." DR 2-104(B)(2)(e)); *In re Alessi*, 60 N.Y.2d 229, 457 N.E.2d 682, *cert. denied*, 465 U.S. 1102 (1984) (direct mail to realtors constitutionally prohibited because legitimate state interest in preventing conflict of interest).

needs. Nevertheless, traditional lawyer aversion to overt solicitation evokes a visceral cry for an absolute ban rather than narrowly drafted distinctions between offensive and inoffensive solicitation.

Practically, there may be real enforcement problems. Disciplinary agencies are notoriously understaffed and overworked. Limited staff time would be better spent policing more serious problems rather than screening all letters that lawyers propose sending to prospective clients or even reviewing them after the fact. Further, agency staff may not know enough underlying facts to determine whether a letter is deceptive or misleading.<sup>204</sup>

Notwithstanding these difficulties, states arguably may be required to permit direct mail solicitation, which falls somewhere between *Ohralik* and *Primus*. *Ohralik* demonstrates that in-person, coercive solicitation can be prohibited.<sup>205</sup> By contrast, the recipient of a letter as in *Primus* is not pressured into an immediate decision, but has an opportunity for careful reflection and response. Also, there is permanent evidence for later review should a question arise as to ethical propriety. With near unanimity, recent opinions have invalidated total bans of targeted direct mail solicitation.<sup>206</sup>

Although the state probably cannot prohibit direct mail solicitation, it retains regulatory power to enact limited content restrictions for misleading or deceptive representations,<sup>207</sup> and reasonable time, place, and manner restrictions. As suggested in *In re R.M.J.*, the state can require disclosure on the envelope that "This is an advertisement."<sup>208</sup> The recipient can therefore avoid an assault on sensibilities by discarding the letter. The state might also consider restricting communications to the emotionally susceptible.<sup>209</sup> The state might, for instance, require a reasonable recuperation period before permitting communication with accident victims and their families, who may need to take time to consider

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204. See, e.g., *Leoni v. State Bar*, 39 Cal. 3d 609, 704 P.2d 183, 217 Cal. Rptr. 423 (1985), *appeal dismissed*, 54 U.S.L.W. 3560 (Feb. 24, 1986) (mass computerized mailing to civil defendants concerning possible need for bankruptcy protection; efforts to particularize letter for recipient often rendered message misleading in light of underlying facts).

205. *Zauderer*, 105 S. Ct. at 2274-75.

206. See *supra* note 203.

207. *Leoni v. State Bar*, 39 Cal. 3d 609, 704 P.2d 183, 217 Cal. Rptr. 423 (1985), *appeal dismissed*, 54 U.S.L.W. 3560 (Feb. 24, 1986); *In re Von Wigen*, 63 N.Y.2d 163, 470 N.E.2d 838 (1984), *cert. denied*, 53 U.S.L.W. 3869 (June 10, 1985).

208. *In re R.M.J.*, 405 U.S. at 206 n.20; *Spencer v. Honorable Justices of Supreme Ct. of Pa.*, 579 F. Supp. at 890.

209. McGrath letter and FTC Staff Report, *supra* note 200. Their proposed language was based on the MODEL RULES (Proposed Final Draft 1981). This language was rejected by the ABA House of Delegates at the February 1983 meeting in preference to a strong nonsolicitation rule.

the possibility of legal action.<sup>210</sup>

c. In-Person Solicitation

Although direct mail solicitation may slowly gain acceptance, in-person solicitation may never be acceptable to many in the profession. Justice Marshall's concurring opinion in *Primus*, however, takes an anti-trust-type approach in suggesting that benign, in-person solicitation might be constitutionally protected. Marshall begins by attempting to provide some principled distinctions between *Ohralik* and *Primus*. He stresses the limited holding in *Ohralik*, that the solicitation of business under the circumstances established in the record presented substantial dangers of harm that the state could constitutionally prohibit.<sup>211</sup> States redrafting solicitation rules, however, should note that the Court did not address "benign" commercial solicitation—"solicitation by advice and information that is truthful and that is presented in a noncoercive, nondeceitful, and dignified manner to a potential client who is emotionally and physically capable of making a rational decision" concerning representation of a nonfrivolous claim.<sup>212</sup>

Justice Marshall rejected any suggestion in *Ohralik* that advertising and solicitation, as different forms of commercial speech, should receive different levels of constitutional scrutiny.<sup>213</sup> Both forms of speech serve similar First Amendment interests and deserve the same level of protection under the commercial speech doctrine.<sup>214</sup> He conceded, however, that in-person solicitation presents greater dangers that the state can seek to avoid.<sup>215</sup>

Justice Marshall also examined the market effects of nonsolicitation rules, which have a discriminatory impact on both the consumers and suppliers of legal services. The assumption that informal word of a lawyer's reputation is sufficient to attract clients would be valid only for "rel-

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210. The rule revisions proposed by the FTC and the Justice Department's Antitrust Division are content regulations in that they prohibit communications under circumstances where a lawyer's communication is likely to be coercive, overbearing or an invasion of privacy, especially when the recipient is probably emotionally susceptible. If such a "healing period" were enacted, there would have to be some commensurate protection for the victims from speedy insurance adjusters. See, e.g., *In re Teichner*, 75 Ill. 2d 88, 387 N.E.2d 265 (1979).

211. *Ohralik*, 436 U.S. at 472-73.

212. *Id.* at 473 n.3. See, e.g., MODEL RULES Rule 7.3(b) (Proposed Final Draft 1981), which prohibits contact with a prospective client concerning employment if (1) the lawyer knows that the person is unable to exercise sound judgment; (2) the person demonstrates to the attorney a desire not to receive communication from the attorney; or (3) the communication involves coercion, duress, or harassment.

213. 436 U.S. at 474 n.5.

214. *Id.* at 474.

215. *Id.* at 474 n.5.

actively elite social and educational circles in which knowledge about legal problems, legal remedies, and lawyers is widely shared.”<sup>216</sup> Nonsolicitation rules deprive primarily the less privileged consumers of useful information. Similarly, the rules appear to have the greatest impact on solo practitioners and small firms, as compared to larger corporate-oriented firms.<sup>217</sup> Given the rules’ origin<sup>218</sup> and impact, he doubted whether states had sufficiently compelling interests to justify restricting the free flow of information when those interests could be well served “by more specific and less restrictive rules than a total ban on pecuniary solicitation.”<sup>219</sup>

By shifting the analysis from simple disdain for Ohralik’s conduct and respect for *Primus*’ pro bono activities to the underlying commercial speech issue, Justice Marshall reminds us that solicitation, as a form of commercial speech, is constitutionally protected and subject to the same type of scrutiny given print advertising in *Bates*. In doing so, he returns to the antitrust-type concern for maximizing consumer welfare that was evident in the *Bates* decision.

The legal profession and its regulators must trust that consumers have the capacity to make rational decisions about securing legal representation when they receive truthful, noncoercive information about available legal services. Regulations depriving consumers of useful information cannot be justified by traditional disdain for lawyers who need to make personal contacts in order to become viable competitors in the legal marketplace. Paternalistic attitudes that consumers are incapable of making rational choices do not justify a ban on in-person solicitation. There should be constraints only on those communications made under coercive circumstances or those indicating that a particular consumer lacks rational decision-making capacity. Unsavory solicitation might be policed by means less restrictive than an outright ban; for example, by application of such contract principles as fraud, undue influence, and unconscionability.

Justice Marshall’s opinion demonstrates that the status of antisolicitation rules under the commercial speech doctrine remains uncertain even after *Ohralik* and *Primus*. While the majority seems content to consider incidents involving solicitation on a case-by-case basis, the commer-

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216. *Id.* at 475.

217. *Id.*

218. It has been argued that the rules were promulgated by established members of the bar to restrain competitive activity of second generation immigrant lawyers bringing personal injury claims. J. AUERBACH, *UNEQUAL JUSTICE* 42-62, 126-29 (1976) (cited in *Ohralik*, 436 U.S. at 476 (Marshall, J., concurring)).

219. 436 U.S. at 476.

cial speech approach gives no notice to attorneys of the propriety of solicitation "falling between the poles"<sup>220</sup> of political nonpecuniary solicitation and coercive commercial solicitation. Antitrust principles might yield more certain results.

Solicitation has received antitrust protection in other professional contexts. *Mardirosian v. American Institute of Architects*,<sup>221</sup> for instance, involved ethical restrictions of the AIA, which prohibited member architects from soliciting prospective clients under contract to other members for architectural services.<sup>222</sup> The court applied the rule of reason to the ethical standard in question<sup>223</sup> and found significant anticompetitive effects without significant procompetitive benefits.<sup>224</sup> The AIA argued that the standard was designed to prevent professional deception and conflicts of interest. Although sympathetic to the argument, the court found it unrelated to competition and therefore inappropriate for consideration under the rule of reason.<sup>225</sup>

Similar protection might be extended to solicitation by lawyers if the rule of reason were applicable. Solicitation has numerous procompetitive effects. First, it promotes competition by enabling the large number of today's underemployed attorneys<sup>226</sup> to obtain clients and stay in practice. This competitive pressure on the marketplace may result in increasingly high standards for the quality of legal work.<sup>227</sup> In addition, solicitation, which permits the free flow of information about the law between lawyer and consumer, may enhance competition by increasing the demand from clients familiar with legal issues and the legal process. Finally, solicitation can benefit the consumer by tailoring legal services and information to the needs and interests of the individual.<sup>228</sup>

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220. *Id.* at 472.

221. 474 F. Supp. 628 (D.D.C. 1979).

222. *Id.* at 645.

223. *Id.* at 639.

224. *Id.* at 647, 648.

225. *Id.* at 648; see also *American Medical Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd* by an equally divided Court, 455 U.S. 676 (1982) (permitting nonoppressive solicitation by physicians); *United States v. Association of Eng'g Geologists*, 1985-1 Trade Cas. (CCH) ¶ 66,349 (C.D. Cal. 1984) (consent decree enjoining trade association's regulation of solicitation, advertising and price competition); *United States v. Alaska Bd. of Registration for Architects, Engineers, and Land Surveyors*, 1985-1 Trade Cas. (CCH) ¶ 66,423 (D. Alaska 1984) (enjoining application of trade association rules of conduct to prohibit competitive bidding and price competition); *Opinion of the Att'y Gen. of Vermont*, 1979-2 Trade Cas. (CCH) ¶ 62,912 (1979) (predicting that antisolicitation rules of professional accountants association would unreasonably restrain trade except under limited circumstances).

226. G. ROSDEN & P. ROSDEN, *supra* note 199, 46-9, at n.37.

227. *Id.* at 46-9.

228. *Id.* at 46-24.1.



Whatever benefits solicitation may confer, it also has potential anticompetitive effects. Coercive pressures may force clients into making hasty or uninformed decisions. A client with an urgent legal problem may decide to forego shopping for legal services and retain the soliciting lawyer. Further, the lawyer may engage in misrepresentation or fraud, structuring the client's case in such a way as to maximize his own gain and minimize his effort at the expense of the client's rights and competition from other attorneys.

On balance, antitrust would extend some protection to solicitation. Where there is a strong possibility of fraud, misrepresentation, or overreaching, the anticompetitive effects of solicitation would outweigh its procompetitive effects. The rule of reason would thus permit regulation of this coercive form of solicitation. However, regulation of benign commercial solicitation, where there is little chance for abuse, would have more anticompetitive than procompetitive effects. Hence, the rule of reason would protect benign commercial solicitation.

The commercial speech doctrine is unlikely to extend any protection to commercial solicitation by lawyers, benign or otherwise. Reluctance to extend this protection may be attributable to enforcement difficulties and concerns bordering on paternalism, that the average consumer is incapable of making a free choice when subjected to the persuasive prowess of the lawyer. In addition, reluctance may stem from concerns for professionalism—some might say snobbery<sup>229</sup>—despite *Bates'* protestations to the contrary. Whatever the motivation, it is unlikely that commercial speech restrictions of commercial solicitation will be lifted. Justice Marshall's opinion warns, however, that prohibiting all forms of benign solicitation based on this interpretation may be constitutionally infirm.

## II. Significance Of Doctrinal Choices

In many ways, antitrust analysis and the commercial speech doctrine have more similarities than differences and often yield similar results when applied to lawyer advertising and solicitation. The commercial speech doctrine protects advertisements that are truthful and not misleading. Because this type of advertising also promotes competition, it is protected under antitrust analysis as well. Antitrust principles appear to protect benign commercial solicitation, while the commercial speech doctrine protects only political, nonpecuniary solicitation. However, coercive solicitation may be prohibited under both analyses. Conduct related to government also receives similar protection under each

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229. *Id.* at 46-02[1].

theory. The commercial speech doctrine prohibits regulation of political information, the free exchange of which is essential to the success of a democratic government. The conduct of a state acting in a governmental capacity is exempt from antitrust review.

The similarity of result arises from similarity in the premises underlying each view: protection of consumers. Antitrust law serves the best interests of consumers by ensuring competition, which can lower prices and increase the quality of goods and services. Consumer protection is also an important component of the commercial speech doctrine. By protecting the free flow of consumer information, which necessarily requires protection of advertising, the commercial speech doctrine promotes product, price, and quality competition, the same elements which underlie antitrust's concern for consumer wealth. By permitting regulation of misleading or deceptive commercial speech, the doctrine again protects the consumer, even at the expense of the speaker.

Although antitrust and commercial speech have much in common, they also differ in some respects. The most obvious difference is procedural: antitrust law may in some ways be easier to enforce. First, a number of different parties may bring antitrust actions, including the Justice Department, the FTC, and even private parties, including consumers injured by anticompetitive conduct. Thus, attorney advertising restrictions would be scrutinized by a wide range of interested parties if antitrust were applicable. Because treble damage awards are sometimes available for antitrust violations, private parties may be motivated to examine the restrictions with special care. Under commercial speech principles, the only parties able to challenge advertising restrictions would be those whose speech is regulated—the lawyer-advertiser. Further, since treble damage awards are not available under the commercial speech doctrine, the incentive to examine speech restrictions closely may be reduced. In short, by foreclosing antitrust review of speech restrictions, integrated state bars—and the legal elite who benefit by the restrictions—are able to reduce the number and intensity of challenges to regulation of solicitation and advertising.

The two theories also differ in focus: antitrust analysis examines the marketplace and related economic and competitive activities, while the commercial speech doctrine looks more closely at policies relating to speech. Commercial speech takes into account not only the interests of the listeners—consumers—but also the rights of the speaker—the lawyer. Commercial speech regulation requires a careful weighing of the respective interests of speaker and state. Thus, crime prevention, privacy, abortion policy, racial integration, child rearing, and aesthetics all

may be significant to the inquiry.<sup>230</sup> Although the market analysis required under antitrust is complex, it does not consider such a wide range of policies.

Although commercial speech may cover the broader range of policies, antitrust covers the broader range of behaviors. The commercial speech doctrine, as its name implies, extends only to speech related behaviors. Antitrust, by contrast, considers any behaviors that affect competition unless those behaviors are exempted; for instance, by the state action exemption.<sup>231</sup>

Overall, the public interest in maximizing consumer welfare without unduly infringing on legitimate self-regulation is well served by the doctrinal choices the Supreme Court has made, *assuming* that commercial speech is constitutionally protected. For jurisprudential concerns related to the First Amendment, it is preferable that the Court encourage competitive conduct by all professions through antitrust doctrine. Perhaps it would result in slightly less vigorous competition for new business in the legal marketplace,<sup>232</sup> but that tradeoff may be necessary to prevent diluting the protection given core First Amendment rights.<sup>233</sup>

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230. E. ROME & W. ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH 121 (1985).

231. Antitrust has been applied to such diverse behaviors as price-fixing, *United States v. Container Corp. of America*, 393 U.S. 333 (1969); conspiracy, 15 U.S.C. § 2 (1982); group boycotting, *United States v. General Motors Corp.*, 384 U.S. 127 (1966); patent misuse, *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952); and the practice of booking films in cinemas, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

232. FEDERAL TRADE COMMISSION LAW ENFORCEMENT IN THE 1980S: A PROGRESS REPORT ON THE FIRST THREE YEARS OF THE REAGAN ADMINISTRATION LEADERSHIP OCTOBER 1982 TO OCTOBER 1984 41-59 (Oct. 1984).

233. Despite the broad application of antitrust policies to conduct in other fields, attorney commercial speech has been one of the few areas of legal ethics in which antitrust analysis has even been considered. *But cf. Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (mandatory bar dues found to be price-fixing). The FTC has brought antitrust actions against lawyers for anticompetitive group boycotts. *See* FTC, Press Release, Judge Dismisses FTC Antitrust Complaint Against D.C. Trial Lawyers, Citing "Special Circumstances" (Oct. 25, 1984).

Because other areas of legal conduct have been less directly affected by antitrust law, lawyers may be less concerned with antitrust actions than members of other professions. Although the legal profession's naturally competitive nature may compensate somewhat for the relatively relaxed antitrust supervision, the question remains as to the impact full antitrust review might have on competition between lawyers. To answer that question, it may be useful to compare the legal profession to the medical profession, which has already felt the effects of antitrust review. A full comparison of the two professions, their entry barriers, structures of practice, and their relation to antitrust and commercial speech law is beyond the scope of this Article. Such an in-depth examination could be valuable in determining the practical impact of the doctrinal choice on the respective professions. The discussion that follows is merely a starting point in that analysis.

The medical profession has been subject to antitrust review for some time. In 1943, the Supreme Court affirmed a lower court finding that the American Medical Association had violated antitrust law by expelling from its membership physicians who participated in a

### III. Improving Access to Legal Services

Canon 2 of the Code of Professional Responsibility states the general, axiomatic principle that a "lawyer should assist the legal profession

health maintenance organization. *American Medical Ass'n v. United States*, 317 U.S. 519 (1943). Since then, the medical profession has faced a number of antitrust challenges on various grounds: for conspiracy to restrain trade, *Complete Serv. Bureau v. San Diego County Medical Soc'y*, 43 Cal. 2d 201, 272 P.2d 497 (1954); for boycott activities, *see, e.g., Feminist Women's Health Ctr., Inc. v. Mohammed*, 415 F. Supp. 1258 (N.D. Fla. 1976); and even for anticompetitive advertising restrictions, *American Medical Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982). Concern for the antitrust implications of medical practice is reflected by the amount of material written on the subject. *See generally Symposium on the Antitrust Laws and the Health Services Industry*, 1978 DUKE L.J. 302-752 (1978).

The legal marketplace appears, on balance, more competitive than the medical marketplace. There are at least three apparent reasons for this difference. First, there are more lawyers than doctors per capita. Second, entry barriers in the legal profession are lower than those in the medical profession. Third, the demand for legal services is less than for medical services.

Between 1970 and 1980, new entrants have swelled the ranks of both professions, which in turn has promoted competition for available business. The more dramatic change has been in the lawyer population, however, which increased by 53 percent, while the physician population increased by only 40 percent. *See* B. CURRAN, K. ROSICH, C. CARSON & M. PUCETTI, *THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE UNITED STATES LEGAL PROFESSION IN THE 1980'S* 4 (1985); BUREAU OF CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* 1985 (105th ed. 1985) No. 157, at 102 and No. 160, at 104 [hereinafter cited as CENSUS DATA]. In 1970, the population/service-provider ratio was 595/1 for physicians and 572/1 for lawyers; in 1980 the ratios were 474/1 and 418/1, respectively. *Id.* Part of the disproportionate increase seems due to an increase in the number of law schools or their student body capacity in response to increased demand for admission. The number and capacity of degree granting medical schools has remained much more constant in this time period. *Id.*

Law schools cannot be held solely responsible for the increased supply of lawyers. Besides social and economic factors which increased the demand for legal education, the entry barriers to establishing a legal practice appear significantly lower than those in the medical profession. Only three years of graduate education are required for law, while four years of graduate school plus up to eight years of specialist training are required for physicians. Note, *Student Workers or Working Students? A Fatal Question for Collective Bargaining of Hospital House Staff*, 38 U. PITT. L. REV. 762, 780 (1977). There are additional entry barriers to the various specialties even though specialization is increasingly important in modern medicine. Grad, *The Antitrust Laws and Professional Discipline in Medicine*, 1978 DUKE L.J. 443, 472-77. Moreover, the formal training period and licensure does not assure one an entry level position as a physician; if suitable employment is not found, the costs of setting up a private practice including equipment and malpractice insurance could be prohibitive. A solo practice by a new law graduate is risky and involves some capital investment, but the initial capital outlay is not as prohibitive. Once admitted to practice before the local courts, a new lawyer can engage in a full range of general practice; referrals and cooperation from other lawyers is invaluable, but not critical to survival. The new physician, however, is dependent on acquiring staff privileges with local hospitals in order to be able to provide full client services. Havighurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 DUKE L.J. 303, 309. Positive relations with other local physicians thus becomes essential for economic survival and not just helpful for referrals and shared expertise. *See id.* at 309-10.

Consumer demand for health care seemingly is less elastic than demand for legal services. During the 1970's, annual physician visits remained relatively constant, ranging between 4.6

and 5.1 visits per year. CENSUS DATA, *supra*, at 104, No. 161. By contrast, the average adult uses a lawyer only once or twice in a lifetime. B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 185-86, 190 (1977) [hereinafter cited as LEGAL NEEDS]; Hazard, Pearce & Stempel, *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1095 (1983). In 1977, only 66% of respondents in one sample had had at least one professional contact with a lawyer. People often do not recognize when they have a problem where a lawyer could help, or they ignore the problem until it demands attention. B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS: SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES 18-26 (1970) (demand for legal services highly elastic). Unlike physical check-ups, preventive legal check-ups are not a regular occurrence.

Because of these significant differences in supply and demand and in the organization of professional practice, one cannot attribute any differences in levels of competition within each profession simply to the application of antitrust or commercial speech doctrine. The next step, then, is to consider the practical impact of doctrinal choice on each of the professions.

Significant differences exist both in the type of alleged anticompetitive activity scrutinized and in procedural aspects of the scrutiny. Under antitrust law, the full range of professional activity may be challenged as anticompetitive, whether the conduct is required by ethical rules, an informal arrangement worked out among physicians, or a formal staffing decision made by a hospital. Because anticompetitive activity occurs at diverse levels within the medical profession and is not primarily dictated by its ethical rules, this broad range of vulnerability is appropriate to further the public interest in maximizing consumer welfare. Formal and informal entry barriers, financial arrangements with third party payors, and organizational forms of practice all create opportunity for anticompetitive conduct in the medical profession. By contrast, because legal rules of conduct tend to be subject to the commercial speech doctrine rather than antitrust law, only action by the state (or the bar association disciplinary committee as its agent) is vulnerable to challenge, and then only if the adopted rules or enforcement activity relates to a lawyer's speech proposing a business transaction. Federal interference with regulations of lawyer ethics is limited to those regulations that impede the free flow of relevant commercial information: advertising, solicitation, trade names, and specialization. Those are the primary areas where ethical rules tend to be anticompetitive, except perhaps for rules relating to the unauthorized practice of law.

A greater number of parties can bring action against medical authorities or practitioners on antitrust grounds than against bar authorities on commercial speech grounds. Health care antitrust claims realistically can be brought by private parties (including other physicians), the Antitrust Division of the Justice Department, or the FTC. Except for limited instances where the per se doctrine applies, such as price fixing, the plaintiff seeking relief must show that the conduct violates the rule of reason in that the anticompetitive tendencies outweigh any procompetitive conduct. This necessitates proof of substantial, complicated issues including market share, effect on competition and damages. Even if a plaintiff prevails under this difficult standard, the decision may have limited impact if the challenged conduct related to private parties, rather than formal ethical standards.

By contrast, only those rules of legal ethics that have been adopted by the states are subject to constitutional challenge. As a practical matter, commercial speech claims will only be raised by other lawyers, either in an action for declaratory or injunctive relief from allegedly invalid rules, or in a defense to a disciplinary charge instituted by the state authorities. McGrath letter, *supra* note 200; FTC Staff Report, *supra* note 200; Calvani, *An FTC Commissioner's View of Regulating Lawyers*, 70 A.B.A. J. 70 (1984). This limited procedural posture is quite significant, because the state authorities have had the opportunity to avoid even this limited vulnerability. In adopting the particular rules, the authorities could minimize the risk of intrusion by drafting rules which impose narrow constraints on permissible commercial speech, and then discipline only those lawyers whose communications are deceptive, mislead-

in fulfilling its duty to make legal counsel available."<sup>234</sup> Ethical Consideration 2-1 identifies three difficulties in fulfilling this goal: educating the public to recognize when they have a legal problem and the importance of seeking assistance; facilitating the intelligent selection of a lawyer; and enabling the public to obtain the services of competent counsel.<sup>235</sup> Ironically, the attainment of this goal is impeded by restrictions on advertising and client solicitation that restrain lawyers from effectively communicating with that portion of the public whose legal needs have gone unmet—the "people of moderate means."<sup>236</sup>

All lawyers engage in some marketing activities, whether through public speaking, community activities, "rain-making" at social functions,<sup>237</sup> mass communications using print or broadcast media, or directed mailings. The real debate over advertising and solicitation is whether those lawyers whose marketing techniques have not yet been authorized will be permitted to communicate with the large segment of Americans not now represented by lawyers.

By restricting lawyers' ability to communicate with the public, regulations on lawyer advertising and solicitation deny many consumers access to our system of justice. They present barriers to the legal education of the public and to overcoming public fear of legal prices, as well as to identifying for prospective clients those attorneys who can provide competence in a given field at a reasonable price.<sup>238</sup> Until the legal profession addresses these issues, as much as seventy percent of the American population may have unmet, legitimate legal needs<sup>239</sup> at a time when many

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ing, or otherwise in violation of the narrow regulations permissible under the commercial speech doctrine.

Perhaps as a trade off to this limited and voluntary vulnerability benefitting state bar authorities, they bear the burden of establishing that the ethical restrictions are constitutionally permissible under *Central Hudson*. If, as suggested in *Zauderer*, state bars must make the same refined distinctions as the FTC on false or misleading communications before a ban will be sustained, this burden can be substantial. Moreover, the risk of an adverse decision that invalidates either a specific provision or an entire disciplinary rule has at least state-wide consequences. The downside risks are, however, limited because damage liability is not an issue.

234. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1981).

235. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1 (1981).

236. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101, DR 2-102, DR 2-103, DR 2-104, DR 2-105 (1981). The term "people of moderate means" is attributable to B. CHRISTENSEN, *supra* note 233, at 20.

237. These are all business-promoting activities authorized under the current rules, MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981). See also Galante, *Firms Finding More Value in Marketing*, Nat'l L.J., Nov. 18, 1985, at 1, col. 4 (brochures, client seminars and newsletters now being used by large, corporate firms to attract or maintain business clients).

238. See B. CURRAN, LEGAL NEEDS at 228-37; FTC Staff Report, *supra* note 202, at 12-13 (citing B. CHRISTENSEN, *supra* note 233, at 19-26).

239. ABA, REVISED HANDBOOK ON PREPAID LEGAL SERVICES 2 (1972).

lawyers are underemployed.

The educational barrier could be overcome with informational advertising alerting the population to the types of assistance lawyers can provide. Public service announcements sponsored by bar associations might be effective. In some instances, direct solicitation of clients likely to have a particular legal problem may be an effective way to educate members of the public about their legal needs. The result would be the stimulation of the elastic latent demand for legal services<sup>240</sup> and an increased public awareness of hitherto unrecognized legal rights.

Advertising and benign solicitation may also allay consumers' price fears. Truthful, nondeceptive information about the fee range for certain standardized legal services and the fee basis for non-routine matters allows the public to determine which of their legal problems are economically worth pursuing. Particularly when the need is discretionary, like most legal services, this information may encourage the consumer to inquire further about available services and the service providers. Additionally, relaxed rules on advertising and solicitation would increase price competition within the legal market, thus lowering the cost of legal services.<sup>241</sup> Concerns that price information will be the single determinative factor in lawyer selection appear unwarranted; consumer response to lawyer advertising indicates they weigh factual and quality information in addition to price.<sup>242</sup> Advertising also tends to stimulate further inquiry about the lawyer's "reputation and other consumers' direct experience."<sup>243</sup>

This concern for reputation leads to a consideration of the third difficulty: how to match potential clients with competent lawyers at affordable costs. Traditional restrictions against advertising and solicitation developed on the assumption that hard work, competence, and honesty would produce good results, which in turn would enhance reputations and increase clientele. That assumption, however, developed at an earlier time, when communities were small and homogeneous, and word-of-

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240. Hazard, Pearce & Stempel, *supra* note 233, at 1092-93.

241. FTC Staff Report, *supra* note 202, at 135.

242. *Id.*

243. *Id.* (citing Lang & Marks, *Consumer Response to Advertisements for Legal Services: An Empirical Analysis—1980*, 8 J. ACAD. OF MARKETING SCI. 357 (1980)). This empirical research substantiates the theoretical underpinnings of commercial speech doctrine, that persons are rational consumers and the professions cannot justify withholding material, truthful information on the paternalistic ground that the public cannot know what is for its ultimate good. See *supra* text accompanying notes 62-68 (discussing *Virginia Bd. of Pharmacy*); see also Hazard, Pearce & Stempel, *supra* note 233, at 1099 (advertising merely provides starting point for consumer to seek other information about lawyer; past failures to perform competently result in harm to reputation).

mouth reputation had wider impact. The traditional assumption may still operate within the smaller business community and among upper income individuals who have regular contact with lawyers and can readily communicate reputation information to each other.<sup>244</sup> Today, however, especially in large metropolitan areas, the legal and lay communities are too diverse and isolated for informal sources to reach the wide range of potential consumers. Unless the legal profession provides the middle and lower income population with easy access to information about various lawyers—the services they provide, the quality of their work, if verifiable, and their fees—these consumers will be forced to select legal representation on the basis of haphazard and often irrelevant criteria.<sup>245</sup> Further, these clients may lose important legal rights because they are unable to understand the legal system, or even because they fear it.

For consumers to gain information about those lawyers who are competent to represent their needs on a cost-effective basis, lawyers must be allowed to communicate directly with their prospective clients. In a competitive market, acquired expertise enhances lawyer efficiency, which benefits the client with lower prices. Efficiency is further increased by economies of scale attained through standardization. Creative use of computers, nonlegal support staff, and other technological innovations make such standardization possible. But lawyers will incur the high start-up costs required for such standardization only if it is cost-effective in the long run; this requires a high client volume for routine services.<sup>246</sup> It may be impossible for attorneys to generate enough client volume to attain this expertise and economy unless they are allowed to contact potential clients directly.

Recent empirical data supports the conclusion that liberal access to mass advertising significantly decreases the fees charged for certain types of legal services.<sup>247</sup> Most legal services amenable to mass marketing techniques are routine and standardizable, so that increased volume will

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244. B. CHRISTENSEN, *supra* note 233, at 128-35.

245. Modern consumers are used to easy access to information. *Id.* at 134. Before *Bates*, when only basic yellow page listings were allowed, lawyer selection may have been based purely on alphabetical order, and who was in the office when the consumer first called. I have been offered employment as a result of chance meetings on buses and airplanes; although I would like to think this is because I exude an aura of competence, humility forces me to admit it is more probably because those persons did not have other easy sources of information about lawyers competent to handle their problems.

246. See generally, Hazard, Pearce & Stempel, *supra* note 233, at 1107-09; FTC Staff Report, *supra* note 202, at 135, 139-41; B. CHRISTENSEN, *supra* note 233, at 44-56.

247. FTC Staff Report, *supra* note 202, at 109-20.



enhance competition with a downward effect on prices,<sup>248</sup> thus enhancing consumer welfare. Information regarding more individualized and complex services is not as readily communicated through advertising. However, even clients in need of these services can be contacted and educated through direct, noncoercive solicitation. Moreover, clients who are willing to pay for costlier, individualized services are unlikely to cross over to firms providing standardized services. Thus, firms that provide individualized services are not competing for the same market as those providing standardized services most amenable to mass marketing technique. New forms of marketing, which allow ever more personalized communication, should be allowed to stimulate latent demand for legal services, increasing both consumer welfare and the economic welfare of currently underemployed lawyers.

No analysis of lawyer advertising and solicitation would be complete without considering quality concerns. Opponents claim that pressure for routinization will force attorneys to ignore individual differences among their clients' legal problems. They assert that in order to maintain lower prices, all problems will be pushed into a standard mold even though they may require individualized attention. There are two responses to this argument.

First, all lawyers have a duty to provide their clients with competent, timely, and loyal representation. Where services are provided through a standardized system, that system must be able to detect problems requiring individualized legal services. In those cases, the client must be apprised of this need and a separate fee arrangement negotiated for the additional services required. Ethical rules can properly require the lawyer to advise of this possibility in order to avoid the "bait and switch" tactics practiced by unscrupulous firms. If a firm does not fulfill its duty of competent, loyal, and efficient representation, that deficiency can be addressed adequately through ordinary disciplinary actions<sup>249</sup> without unnecessary restrictions of communication.

Second, the legal profession must relinquish the paternalistic assumption that it alone is capable of evaluating what is best for the lay public. Consumers are accustomed to making rational economic choices in their market decisions involving nonlegal goods and services. In fact, the antitrust laws have mandated that nonlaw professions allow consumers free choice in selecting their services. Consumers should also be permitted this freedom when purchasing legal services. Obviously,

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248. Hazard, Pearce & Stempel, *supra* note 233, at 1100-07.

249. See, e.g., *Mezrano v. Alabama State Bar*, 434 So. 2d 732 (Ala. 1983); *In re Sekerez*, 458 N.E.2d 229 (Ind. 1984).

consumers are capable of choosing between high priced, luxury automobiles with advanced safety equipment, and economy models. There is no reason to deny them a comparable choice among legal services. This is especially true when higher prices might keep consumers from obtaining legal services altogether: economical justice is better than no justice at all. Adoption and enforcement of restrictive ethical rules impeding the flow of relevant, nondeceptive information about available legal services works against the legitimate goals underlying self-regulation of the legal profession<sup>250</sup> and the legal needs of the general public.

### Conclusion

There is an ironic circularity to protecting lawyers' marketing communications with commercial speech doctrine. Those segments of the profession which dislike overtly commercial activities lobby for restrictive advertising and solicitation rules. Because those rules are adopted and enforced by an entity of the state, they are exempt from antitrust scrutiny designed to foster competition for the welfare of consumers. Yet, that state action which qualifies these anticompetitive rules for the antitrust exemption also brings about scrutiny on constitutional grounds. The first amendment doctrine is necessarily focused on speech, not the broad range of anticompetitive conduct scrutinized under antitrust law. Consumer welfare is a primary value under both doctrines, although commercial speech considers other, diverse values. Nevertheless, the limited parties and procedural context result in greater focus on the substantive protection given commercial speech. And thus, the constitutional doctrine fosters indirectly just that competitive activity which the antitrust-exempt ethical rules were intended to inhibit.

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250. Between 1924 and 1950, a disproportionate amount of enforcement resources were devoted to policing anticompetitive ethical rules. See G. HAZARD & D. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 290 (1985).

